No. 97-1139-CFY Title: United States, Petitioner
v.
Jacinto Rodriguez-Moreno

Docketed: January 8, 1998 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Dec 15 1997	Application (A97-446) to extend the time to file a petition for a writ of certiorari from December 25, 1997 to January 25, 1998, submitted to Justice Souter.
	Dec 16 1997	Application (A97-446) granted by Justice Souter extending the time to file until January 25, 1998.
	Jan 7 1998	Petition for writ of certiorari filed. (Response due February 7, 1998)
	Jan 29 1998	Waiver of right of respondent Omar Torres-Montalvo to respond filed.
	Feb 25 1998	DISTRIBUTED. March 20, 1998
	Feb 26 1998	Response requested.
	Mar 19 1998	Brief of respondent Jacinto Rodriguez-Moreno in opposition filed.
	Mar 19 1998	Motion of respondent for leave to proceed in forma pauperis filed.
	Apr 1 1998	REDISTRIBUTED. April 17, 1998
	Apr 7 1998	Reply brief of petitioner United States filed.
	Jun 1 1998	REDISTRIBUTED. June 4, 1998
	Jun 8 1998	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 8 1998	Petition GRANTED. SET FOR ARGUMENT December 7, 1998. **********
	Jun 26 1998	Motion of respondent for appointment of counsel filed.
	Jul 7 1998	Order extending time to file brief of petitioner on the merits until August 7, 1998.
	Jul 8 1998	DISTRIBUTED. September 28, 1998 (Page 38)
	Aug 4 1998	Joint appendix filed.
	Aug 7 1998	Brief of petitioner United States filed.
	Aug 20 1998	Order extending time to file brief of respondent on the merits until September 21, 1998.
	Sep 22 1998	Brief of respondent Jacinto Rodriguez-Moreno filed.
	Sep 22 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Oct 5 1998	Motion for appointment of counsel GRANTED and it is ordered that John P. McDonald, Esquire, of Somerville, New Jersey, is appointed to serve as counsel for the respondent in this case.
	Oct 21 1998	Reply brief of petitioner United States filed.
	Nov 6 1998	CIRCULATED.
	Nov 18 1998	Record requested.
	Nov 19 1998	Record filed.
	Dec 7 1998	ARGUED.
	Dec 9 1998	Record filed.

Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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77 pp

QUESTION PRESENTED

Whether venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) is proper in any district in which the defendant committed the underlying crime of violence, even if the defendant did not use or carry the firearm in that district.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

UNITED STATES OF AMERICA, PETITIONER

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JACINTO RODRIGUEZ-MORENO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 121 F.3d 841.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1997. A petition for rehearing was denied on September 26, 1997. App., *infra*, 57a-58a. On December 16, 1997, Justice Souter extended the time for filing a petition for a writ of certiorari to and including January 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3, of the United States Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Section 924(c)(1) of Title 18, United States Code, provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm,

> shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * * .

4. Section 3237(a) of Title 18, United States Code, provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

5. Rule 18, Federal Rules of Criminal Procedure, provides:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, six defendants, including respondent Jacinto Rodriguez-Moreno, were convicted on one count of conspiracy to kidnap, in violation of 18 U.S.C. 1201(c); and one count of kidnapping Ephrain Avendano, in violation of 18 U.S.C. 1201(a)(1). Respondent and all of the other defendants except Randy Alvarez-Quinones were also convicted on one count of kidnapping Avendano's wife, Marbel Avendano, in violation of 18 U.S.C. 1201(a)(1). Three of the defendants, but not respondent, were convicted on one count of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Respondent was the only defendant convicted of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). See Pet. App. 2a.

1. Avendano was the middleman in a cocaine transaction in which another participant, Fanol Ochoa, absconded with 30 kilograms of cocaine without paying for the drugs. On December 12, 1994, defendants Omar Torres-Montalvo and Jorge Luis Pacheco kidnapped Avendano and held him in various locations in Houston, Texas, while they searched for Ochoa. Defendant Jairo Pedroza-Ortiz, defendant Milton Palma-Ruedas, and respondent were hired to look for Ochoa and to keep Avendano captive. After hearing that Ochoa was in New York, respondent, Pacheco, Montalvo, Ortiz, and Palma-Ruedas drove Avendano from Texas to Avendano's apartment in Middlesex, New Jersey. Avendano, his wife, and his four small children were held captive in the New Jersey apartment while the defendants continued to look for

Ochoa. Respondent threatened to kill Avendano if Ochoa was not found. App., *infra*, 3a-5a; Gov't C.A. Br. 9-10.

On January 1, 1995, Avendano was taken to the house of defendant Randy Alvarez-Quinones in Newburgh, New York. After a police detective inquired about one of the cars at the Newburgh house, the defendants decided to drive Avendano to Maryland. Respondent, his five co-defendants, and Avendano arrived at a house in Maryland early on January 2, 1995. With the other defendants watching, respondent grabbed a .357 magnum revolver that was in the house, put it to Avendano's neck, and stated that he was ready to kill Avendano. Avendano subsequently managed to escape from the house, run to a neighbor's house a few blocks away, and call his wife in New Jersey. Mrs. Avendano contacted the police in New Jersey, while the neighbor called the police in Maryland. App., *infra*, 6a-7a; Gov't C.A. Br. 12-14.

After obtaining a search warrant, Maryland police entered the house from which Avendano had escaped. The police arrested respondent and his co-defendants and seized the .357 magnum revolver, on which they found respondent's fingerprint. App., *infra*, 7a.

2. The six defendants were tried jointly on the kidnapping and narcotics charges in the United States District Court for the District of New Jersey. At the conclusion of the government's case, the court dismissed the drug conspiracy charges against respondent, Palma-Ruedas, and Ortiz pursuant to Federal Rule of Criminal Procedure 29(a). App., *infra*, 7a-8a.

Respondent also moved to dismiss the Section 924(c)(1) firearm charge against him for lack of venue in the District of New Jersey. App., *infra*, 9a.

The government acknowledged that respondent had used and carried the .357 magnum revolver only in Maryland. *Ibid.* Nevertheless, the government argued that venue for the firearm charge was proper in New Jersey, because venue for the predicate kidnapping crime of violence was proper in that district. *Ibid.* The district court concluded that respondent could properly be tried in New Jersey on the firearm charge, stating that it was "absolutely persuaded" (C.A. App. 468) by the Fifth Circuit's analysis of the same venue issue in *United States* v. *Pomranz*, 43 F.3d 156, cert. denied, 116 S. Ct. 513 (1995).[1] App., *infra*, 10a.

The jury found respondent guilty on one count of conspiracy to kidnap Avendano and his wife, one count of kidnapping Avendano, one count of kidnapping Mrs. Avendano, and one count of using or carrying a firearm in connection with the kidnapping of Avendano. App., *infra*, 2a, 7a-8a. Respondent was sentenced to 87 months' imprisonment on the three kidnapping counts and to a consecutive 60-month term on the firearm count. *Id.* at 8a n.2.

3. A divided panel of the court of appeals affirmed the convictions of all six defendants, except for respondent's Section 924(c)(1) conviction. App., *infra*, 1a-40a. The majority concluded that venue for that count was not proper in New Jersey because respondent did not use or carry the firearm there, notwithstanding the fact that venue was proper in New Jersey for the predicate kidnapping charges. *Id.*

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[1] *Pomranz* concluded that venue in a Section 924(c)(1) prosecution is proper in any district where the underlying drug or violent crime occurred, even if the defendant did not use or carry a firearm in that district. See 43 F.3d at 159-162.

at 8a-18a. The court acknowledged (see *id.* at 11a-13a) that its resolution of the venue question conflicted with the Fifth Circuit's decision in *Pomranz*.[2] The court concluded, however, that

> to determine where venue should lie under § 924(c)(1) the "verb test" is the proper test. Applying that test here, we find that § 924(c)(1) unambiguously designates the criminal conduct that is prohibited as "using" or "carrying" a firearm. It follows that one "commits" a violation of § 924(c)(1) in the district where one "uses" or "carries" a firearm. Accordingly, we conclude that because the crime committed by [respondent]—*carrying* or *using* a firearm in relation to a crime of violence—occurred only in Maryland, [respondent] could only have been properly tried in Maryland.

Id. at 14a-15a (footnote omitted).

The court of appeals observed that its holding would not have precluded the government from joining the kidnapping and gun charges at a single trial, since respondent could have been tried for both offenses in Maryland. App., *infra*, 15a. It acknowledged that "Congress could have drafted [Section 924(c)(1)] to allow venue to lie in any district where the government could properly bring the related crime of violence or drug trafficking offense." *Id.* at 18a. The

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[2] The court of appeals relied (see App., *infra*, 12a, 13a, 14a-15a) on the Ninth Circuit's decision in *United States* v. *Corona*, 34 F.3d 876 (1994). The court in *Corona* held that venue in Nevada was improper for the defendant's Section 924(c)(1) prosecution (the defendant not having entered the State), even though venue in Nevada was proper for the charge of conspiracy to distribute cocaine. *Id.* at 879-881.

court concluded, however, that the language actually chosen by Congress did not accomplish that result. See *id.* at 17a-18a.

Judge Alito dissented from the reversal of respondent's Section 924(c)(1) conviction. App., *infra*, 40a-56a. Judge Alito reasoned "that the commission of the crime of violence or drug trafficking crime is a critical element of the [Section 924(c)(1)] offense and that permitting venue in a district in which the commission of this underlying crime occurred is consistent with the Constitution's venue provisions." *Id.* at 41a. Because "[t]he constitutional venue provisions were meant to put in place important *substantive* protections against government abuse," Judge Alito stated, their application should not "be determined by diagramming the language of the relevant criminal statute." *Id.* at 47a-48a. He added that, "while the 'verb test' may provide a useful first cut at determining venue," this Court "has never embraced the 'verb test,'" and "there are complicated crimes for which a rigid grammar-based test may not be appropriate." *Id.* at 48a. Without offering "an alternative 'test' that works in all cases," Judge Alito concluded that "it is enough to show that in a prosecution under 18 U.S.C. § 924(c)(1) the commission of the crime of violence or drug trafficking crime is a sufficiently important element to permit venue in any district in which the defendant engages in that conduct." *Id.* at 49a. Thus, Judge Alito would have held that venue in the District of New Jersey was proper and would have affirmed respondent's Section 924(c)(1) conviction. *Id.* at 56a.

The government filed a petition for rehearing with suggestion for rehearing en banc addressed solely to the venue question. On September 26, 1997, the Third Circuit voted 6-6 to deny that petition. App., *infra*, 57a-58a.

REASONS FOR GRANTING THE PETITION

"[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916). See *Travis* v. *United States*, 364 U.S. 631, 636 (1961) ("Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act.'"). Because an essential element of the offense defined by 18 U.S.C. 924(c)(1) is that the firearm in question must have been used or carried "during and in relation to" a "crime of violence or drug trafficking crime," any district in which that crime of violence or drug trafficking crime occurred is a proper venue for a Section 924(c)(1) prosecution. The Third Circuit's contrary holding conflicts with a decision of the Fifth Circuit and may significantly impair the efficient conduct of prosecutions under Section 924(c)(1).

1. The Third Circuit's decision in this case conflicts with the Fifth Circuit's decision in *United States* v. *Pomranz*, 43 F.3d 156, cert. denied, 116 S. Ct. 513 (1995). In *Pomranz*, the defendant was convicted in the United States District Court for the Northern District of Texas of, *inter alia*, conspiracy to distribute marijuana, in violation of 21 U.S.C. 846; possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). 43 F.3d at 157. The Section 924(c)(1) conviction involved an automatic weapon that the defendant carried in Oklahoma while he paid for a large

shipment of marijuana. *Id.* at 158. The marijuana had not been delivered in Oklahoma, however, but had been given to the defendant's confederates in Dallas. "[N]o evidence was presented to indicate that Pomranz used or carried the weapon at any time within the Northern District of Texas." *Ibid.*

The Fifth Circuit nevertheless concluded that venue for the Section 924(c)(1) offense was proper in the Northern District of Texas. The Fifth Circuit explained:

> The initial predicate necessary for a violation of § 924(c)(1) is a crime of violence or drug trafficking. It is only when a firearm is used or carried during and in relation to such violent or drug trafficking crime that the § 924(c)(1) offense becomes complete. Since the indispensable predicate offense is as important or essential to the completed offense as the carrying or using of the firearm and since the use or carrying of the firearm itself must be made during and in relation to such predicate offense, it only follows that venue should be allowed where the violent crime or drug offense occurred. Thus, a firearm may be used in one state but it does not preclude a commission of a § 924(c)(1) offense in another state.

43 F.3d at 162. The court therefore held that venue was proper in the Northern District of Texas for the defendant's Section 924(c)(1) conviction and affirmed the defendant's consecutive five-year prison term on that count. *Ibid.*

2. The Fifth Circuit's holding in *Pomranz* is correct. The Constitution guarantees a criminal defendant the right to be tried in the State and district

in which the crime "shall have been committed." U.S. Const. Art. III, § 2, Cl. 3; Amend. VI. Thus, the question whether venue in a particular district is proper turns on a "determination of where the crime was committed." *United States* v. *Cores*, 356 U.S. 405, 407 (1958). As this Court explained in *United States* v. *Anderson*, 328 U.S. 699 (1946), "[t]he constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides." *Id.* at 704-705 (footnote omitted). Accord, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76 (1908) ("The constitutional requirement is as to the locality of the offense and not the personal presence of the offender."). In deciding where an offense was committed, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703.

Section 924(c)(1) makes it a crime to "use or carry" a firearm only "during and in relation to" the commission of a drug trafficking offense or a violent crime. "The mere carrying or use of a firearm is not the criminal *actus reus* proscribed"; instead, the essence of the offense is "that a criminal defendant used a firearm in committing another federal crime." *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993). Because the firearm's use is "inextricably intertwined with the underlying offense" (*id.* at 1084), Section 924(c)(1) defines an offense that has "distinct parts," and that may therefore be prosecuted in any district "where any part can be proved to have been done." *Lombardo*, 241 U.S. at 77.

3. The question presented is of importance to the enforcement of Section 924(c)(1). Section 924(c)(1) is

a widely used federal statute. Not infrequently, the illegal conduct that underlies a Section 924(c)(1) offense will span multiple States, but the use or carrying of a firearm may be linked with only part of the predicate crime. In such cases, the court of appeals' holding may compel the selection of a district of prosecution that is not well suited to the fair and efficient administration of justice.

The court of appeals sought to diminish the significance of its decision by observing that the government might have joined the kidnapping and firearms charges at a single trial by trying respondent in Maryland. See App., *infra*, 15a. With respect to continuing offenses (such as the kidnapping charges at issue here), however, the government may have legitimate reasons—*e.g.*, convenience of witnesses, effective deployment of government personnel, or conservation of prosecutorial or judicial resources—to choose one permissible forum rather than another.[3] The rule adopted by the court of appeals will, at least in some cases, force the government to choose between (a) prosecuting the

[3] In the instant case, respondent and four co-defendants were convicted of kidnapping Mrs. Avendano, see App., *infra*, 7a—a crime that occurred wholly within New Jersey and New York. The court of appeals deemed that fact to be "not particularly relevant to [its] venue analysis." *Id.* at 15a-16a n.5. That is incorrect. In light of the close factual connection between the kidnappings of Avendano and his wife, the government's desire to try all the kidnapping charges together was a legitimate basis for choosing to prosecute respondent for Avendano's kidnapping in New Jersey rather than in Maryland. Under the court of appeals' decision, however, the consequence of the government's choice was that the Section 924(c)(1) charge could not be brought together with the prosecution for the predicate violent crime.

underlying drug trafficking or violent crime in a less convenient forum, (b) "duplicat[ing] its efforts and once again lay[ing] the foundation for the firearm offense" in the district where the weapon was actually used or carried, *Pomranz*, 43 F.3d at 161; or (c) foregoing the Section 924(c)(1) prosecution altogether. Nothing in the Constitution or relevant statutes requires that the government be put to that choice.

More generally, the government has a strong interest in venue rules that are clear, uniform, and easily administered, particularly because an appellate court's post-trial determination that venue was improper may serve as the basis for reversal of a criminal conviction. See, *e.g.*, *Travis*, 364 U.S. at 637. As Judge Alito's dissent notes, the Third Circuit's opinion in this case relies on a "rigid application" of the "verb test" for venue, a test that this Court "has never embraced." App., *infra*, 48a-49a. Thus, in addition to the impact of the decision in Section 924(c)(1) cases, the venue analysis adopted by the Third Circuit has the potential to affect criminal prosecutions brought under other federal statutes.

4. On October 10, 1997, the government filed a petition for a writ of certiorari in *United States* v. *Cabrales*, No. 97-643.[4] The petition in that case is currently pending before this Court. *Cabrales* presents the question whether venue in a prosecution for money laundering under 18 U.S.C. 1956 and 1957 is proper in the district where the illicit funds were generated, when the defendant's unlawful financial transactions occurred in another district. Our peti-

[4] We have provided counsel for respondent with copies of our petition and reply brief in *Cabrales*.

tion argues that, in the absence of statutory language specifying a contrary rule, venue in a federal criminal prosecution is generally proper in any district where an essential element of the criminal activity in the offense was committed. See 97-643 Pet. 12-13. That position, if adopted by this Court, would compel reversal of the court of appeals' decision in the instant case.

If this Court grants the petition in *Cabrales* and rules in the government's favor, its decision will very likely be dispositive of the instant case. The petition in this case should therefore be held pending the Court's resolution of *Cabrales* and disposed of as appropriate in light of the resolution of that case. In the alternative, the Court may wish to grant the petition and set the case for briefing and argument together with *Cabrales*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Cabrales*, No. 97-643, and disposed of as appropriate in light of the resolution of that case. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5554, 95-5601, 96-5160, 96-5161, 96-5162 and 96-5163

UNITED STATES OF AMERICA

v.

MILTON PALMA-RUEDAS, APPELLANT

UNITED STATES OF AMERICA

v.

JORGE LUIS PACHECO, APPELLANT

UNITED STATES OF AMERICA

v.

OMAR TORRES-MONTALVO, APPELLANT

UNITED STATES OF AMERICA

v.

JAIRO PEDROZA-ORTIZ, APPELLANT

UNITED STATES OF AMERICA

v.

RANDY ALVAREZ-QUINONES, APPELLANT

UNITED STATES OF AMERICA

v.

JACINTO RODRIGUEZ-MORENO, A/K/A JOEL MORENO, JOEL MORENO-LLANOS, ARTURO TORRES CELORIO, JACINTO RODRIGUEZ-MORENO

[Argued: Nov. 12, 1996
Decided: July 30, 1997]

Before: ALITO, ROTH and LEWIS, Circuit Judges.

OPINION OF THE COURT

LEWIS, Circuit Judge.

Defendants—Omar Torres-Montalvo ("Montalvo"), Jorge Luis Pacheco ("Pacheco"), Randy Alvarez-Quinones ("Quinones"), Milton Palma-Ruedas ("Palma- Ruedas"), Jairo Pedroza-Ortiz ("Ortiz"), and Jacinto Rodriguez-Moreno ("Moreno")—appeal their convictions on charges arising from a drug conspiracy and kidnapping scheme. All six defendants were convicted by a jury in the United States District Court for the District of New Jersey of kidnapping and conspiracy to kidnap, in violation of 18 U.S.C. § 1201(a)(1) and 18 U.S.C. § 1201(c). Montalvo, Pacheco, and Quinones were also convicted of conspiracy to distribute and possess cocaine, in violation of 21 U.S.C. § 846. In addition, Moreno was convicted of using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). In this consolidated appeal, defendants challenge their convictions on numerous grounds. We will discuss each

of these challenges in turn, focusing in more detail on Moreno's claim that venue in New Jersey was improper to try the § 924(c)(1) count.

We will conclude that venue was improper in New Jersey and, accordingly, we will reverse Moreno's conviction under 18 U.S.C. § 924(c)(1). We will affirm the defendants' convictions on all other counts.

I.

Defendant Montalvo ran a cocaine distribution enterprise out of Texas. In July of 1994, Ephrain Avendano ("Avendano"), the kidnapping victim, introduced Montalvo to Fanol Ochoa ("Ochoa"), a New York drug dealer, so that Montalvo and Ochoa could discuss a possible cocaine transaction. Thereafter, Avendano served as the middleman between Montalvo and Ochoa.

In October of 1994, Montalvo and another defendant, Pacheco, arranged to sell Ochoa fourteen kilograms of cocaine. Avendano acted as the middleman in this deal. Montalvo hired Raul Lopez ("Lopez"), who later became a key witness for the government, and another friend to "do the run" from Texas to New York because Lopez owned a car with a secret compartment. On October 29, 1994, while en route to New York, Lopez was arrested and the fourteen kilos of cocaine were seized. Montalvo called Avendano to let him know that the deal had been thwarted and that he had hired lawyers to represent Lopez.

In November of 1994, Montalvo and his cousin, Defendant Quinones, met with Avendano. Montalvo

told Avendano that the seizure of the fourteen kilos and the legal fees were "a big loss" and that he needed to make a new deal to compensate for it. Avendano conveyed this information to Ochoa, who agreed to strike another deal with Montalvo for twenty kilograms of cocaine. Avendano, again acting as the middleman, agreed to fly to Houston and help Ochoa execute the deal with Montalvo. Avendano arrived in Houston on December 11, 1994, and was met at the airport by Ochoa and another man named "Baldy." Ochoa told Avendano that the deal had been increased to thirty kilograms of cocaine and that Montalvo had agreed to give Ochoa the extra ten kilograms on credit. Ochoa then informed Avendano of the plan to get the cocaine from Montalvo: Avendano and Baldy were to meet Montalvo, Baldy would put the cocaine in his car, and Avendano would call Ochoa, who would then deliver the money. Ochoa explained that he was not meeting Montalvo personally because of "reasons of security."

Pursuant to this plan, Montalvo and Pacheco met Avendano and Baldy. Baldy instructed Montalvo and Pacheco to place the thirty kilos of cocaine in a suitcase, and Baldy drove away with the drugs. When Avendano tried to execute the last phase of the deal—to call Ochoa to secure payment for Montalvo—Ochoa did not answer his pager.

Obviously, Montalvo was not happy about being taken advantage of by Ochoa for the price of the drugs, which was nearly half-a-million dollars. And, in response, Montalvo and Pacheco informed Avendano that he was "responsible" for the money, warning him that they may have to turn him over to the "Medellin people."

On December 12, 1994, Montalvo called Avendano's wife, Marbel Avendano, and told her that he was holding Mr. Avendano. Montalvo informed Mrs. Avendano that he could not let Mr. Avendano go until he found Ochoa because Avendano was "his only guarantee." Montalvo and Pacheco then moved Avendano to an apartment in Houston and then to a house. Avendano was kept in the house for two weeks. Montalvo was armed at all times.

After hearing that Ochoa was in New York boasting about how he had "ripped- off" Montalvo, Montalvo forced Avendano to disclose the address of his mother and cousin in Columbia and the address of his home in New Jersey. Montalvo then informed Avendano that they were all going to travel to Avendano's home in New Jersey to continue the search for Ochoa. Montalvo warned Avendano not to try anything "because it could work out worse for him."

That same day, Pacheco showed up at the apartment with three men, Defendants Ortiz, Palma-Ruedas, and Moreno, who had been hired to help look for Ochoa and keep Avendano captive. Ortiz, Palma-Ruedas, and Moreno travelled with Pacheco, Montalvo, and Avendano from Texas to New Jersey. They arrived in New Jersey at Avendano's apartment on December 28, 1994. Using Avendano's apartment as a home base, the defendants spent the next few days looking for Ochoa.

On January 1, 1995, they all went to Quinones's house in Newburgh, New York. Mrs. Avendano stayed at the Avendanos' apartment in New Jersey. Both Mr. Avendano and Mrs. Avendano testified at trial that at this point they thought they would never see each other again.

Before Avendano arrived with Pacheco at Quinones's house, Montalvo had decided that the house was not safe because police had inquired about the car with Texas plates in the driveway. Montalvo then informed the group that they were going to travel to Maryland that night. As they got ready to leave, Montalvo told Avendano to carry the guns so that if they were pulled over on the way, Avendano would be responsible for the guns.

Montalvo, Pacheco, and Avendano travelled in one car, and Ortiz, Palma-Ruedas, Moreno, and Quinones travelled in another. Early in the morning on January 2, 1995, they all arrived at a house in Maryland owned by Mr. Morillo. Soon after their arrival in Maryland, Morillo showed off his .357 magnum revolver to the men. Meanwhile, Montalvo continued his search for Ochoa from the house in Maryland. Once it became clear that Montalvo's search for Ochoa was fruitless, tensions among the men began to run high. At one point, Moreno told Montalvo that they "were just wasting time" and that they should "just get it over with and kill Avendano." Moreno then put Morillo's .357 magnum to the back of Avendano's neck, making it clear that he was going to kill him. Shortly thereafter, Avendano was able to escape from the rear of the house.

Avendano ran to a neighbor's house, where he frantically begged the neighbor in broken English to let him use the phone. Avendano called his wife in New Jersey, and his wife got on the phone with the neighbor and asked him to call the police because her husband was in danger. Mrs. Avendano also called the police in New Jersey.

When the police arrived at the neighbor's house, Avendano related the story of his kidnapping to the police. Meanwhile, back in New Jersey, the police had also shown up at the Avendanos' apartment with the FBI. The Maryland police were able to corroborate Avendano's story with the police in New Jersey. The Maryland police put the Maryland house under surveillance, secured a search warrant, and entered the house. All six defendants were arrested, and the police seized the .357 magnum with Moreno's fingerprints on it, Montalvo's pager, Montalvo's cell phone, a faxed photograph of Ochoa, and papers bearing the telephone numbers of Avendano's and Ochoa's beepers.

All six defendants were indicted for: (1) kidnapping Avendano; (2) conspiring to kidnap Avendano and his wife; and (3) conspiring to distribute and possess with intent to distribute cocaine. All defendants except Quinones were indicted for kidnapping Mrs. Avendano. In addition, Moreno was indicted for using and carrying a firearm in relation to a crime of violence.

The defendants were jointly tried by jury in the United States District Court for the District of New Jersey. At the conclusion of the government's case, Palma-Ruedas, Ortiz, and Moreno moved to dismiss

the drug conspiracy charges against them pursuant to Rule 29 of the Federal Rules of Criminal Procedure.[1] The district court granted their Rule 29 motion, finding that the government had failed to prove that Palma-Ruedas, Ortiz, and Moreno had intended to join a cocaine distribution conspiracy. J.App. at 470. The jury found the defendants guilty of all remaining counts.[2]

All six defendants appealed, and we consolidated their appeals. The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291.

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[1] Rule 29(a) provides, in pertinent part:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Fed. R.Crim. P. 29(a).

[2] Montalvo was sentenced to life imprisonment on four counts to be served concurrently. Pacheco was sentenced to 292-months imprisonment on four counts to be served concurrently. Quinones was sentenced to 151-months imprisonment on three counts to be served concurrently. Palma-Ruedas was sentenced to 135-months imprisonment on three counts to be served concurrently. Ortiz was sentenced to 96-months imprisonment on three counts to be served concurrently. Moreno was sentenced to 87-months imprisonment on three counts to be served concurrently and 60-months imprisonment on the § 924(c)(1) count to be served consecutively.

II.

A. *Venue*

Defendant Moreno was indicted and convicted of violating 18 U.S.C. § 924(c)(1). That section provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .

18 U.S.C. § 924(c)(1).

At the conclusion of the government's case, Moreno moved to dismiss the § 924(c)(1) count for lack of venue. Moreno argued that because the evidence conclusively established that he had neither "used" nor "carried" the .357 magnum revolver outside of Maryland, venue could only properly lie in Maryland. The government conceded that Moreno had only used or carried the gun in Maryland but maintained that venue in New Jersey was proper nonetheless. According to the government, venue was proper in New Jersey for the gun charge because venue in New Jersey was proper for the predicate offense of kidnapping.

Having no guidance from this Circuit on the venue issue, the district court was forced to choose between two opposing analyses offered, respectively, by the Ninth Circuit and the Fifth Circuit. *Compare United States v. Corona*, 34 F.3d 876, 879 (9th

Cir.1994) (holding that Nevada was improper venue for trying defendant on § 924(c)(1) charge, even though Nevada was proper venue for trying defendant on underlying drug conspiracy, when defendant never actually used or carried the firearm in Nevada), *with United States v. Pomranz*, 43 F.3d 156 (5th Cir. 1995) (holding that defendant was properly tried for unlawful use of a firearm during drug trafficking offense in any district in which venue was proper for underlying drug distribution conspiracy). Apparently persuaded by the Fifth Circuit's decision in *Pomranz*, the district court concluded that Moreno could properly be tried in New Jersey for violation of 18 U.S.C. § 924(c)(1). *See* J.App. at 468.

Moreno's appeal requires us to address, for the first time, whether the Constitution requires a defendant to be tried under § 924(c)(1) in the venue where the violation of that statute took place. Or, to state the issue differently, can the government try a defendant for using or carrying a firearm in any venue where it may try the related crime when the defendant neither carried nor used the firearm in that venue? Because the district court's decision regarding proper venue was an interpretation of law, we have plenary review. *United States v. Baxter*, 884 F.2d 734, 735 (3d Cir. 1989).

Article III, Section II of the Constitution states in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment, shall be . . . held in the State where the said crimes shall have been committed. . . ." U.S. Const. art. III, § 2. Thus, by its

explicit terms, the Constitution requires crimes to be tried *where* they are *committed*.[3]

Moreover, we have emphasized that proper venue is not just a mere formal requirement but, rather, a right of constitutional dimension. *See United States v. Baxter*, 884 F.2d 734, 736 (3d Cir. 1989) ("[p]roper venue in criminal trials is more than just a procedural requirement; it is a safeguard guaranteed twice by the United States Constitution itself."); *see also United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) ("The venue provisions of the Constitution are important safeguards, protecting an accused from unfairness and hardship in defending against prosecution by the federal government.").

The government urges us to disregard these constitutional dictates and adopt the approach of the Fifth Circuit in *Pomranz*. Moreno urges us to adopt

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[3] This requirement is reinforced by the vicinage provision of the Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district *wherein the crime shall have been committed*. . . .

U.S. Const. amend VI. (emphasis added). *See United States v. Anderson*, 328 U.S. 699, 703, 66 S. Ct. 1213, 1216, 90 L.Ed. 1529 (1946).

In addition, Rule 18 of the Federal Rules of Criminal Procedure provides:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district *in which the offense was committed*.

Fed. R. Crim. Proc. 18 (emphasis added).

the approach of the Ninth Circuit in *Corona*. Because *Corona* and *Pomranz* elucidate the parameters of this issue, we will discuss those cases in some detail.

In *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994), the Ninth Circuit reversed the conviction of the appellant for the unlawful use of a firearm in violation of § 924(c)(1) because of improper venue. Adopting a "key verbs" test, which examines the verbs in the statute that define the criminal conduct to determine where the offense was committed, the court held that Nevada was not the proper venue for the substantive crimes arising from the conspiracy—distribution of cocaine and use of a firearm during drug trafficking—which occurred entirely in California. *Id.* at 880. Because the defendant had not *distributed* cocaine nor *used* a firearm in Nevada, venue was improper, even though the conspiracy counts were properly tried in Nevada.

In *United States v. Pomranz*, 43 F.3d 156 (5th Cir.), *cert. denied*, —U.S. —, 116 S. Ct. 513, 133 L.Ed.2d 422 (1995), the Fifth Circuit explicitly rejected the Ninth Circuit's analysis. The Fifth Circuit noted that the Ninth Circuit's approach would "effectively undermine the Congressional intent to curb the violence inherently associated with high level drug deals." *Pomranz*, 43 F.3d at 161. Because a violation of § 924(c)(1) is necessarily intertwined with the predicate act of drug trafficking or committing a violent crime, the Fifth Circuit concluded that § 924(c)(1) violations can be properly tried in the same venue as the underlying drug or violent crime offense. *Id.* In reaching this conclusion, the court relied

heavily on policy concerns—that the government would have to "expend its limited resources in prosecuting a felon a second time for this separate offense, or satisfy itself with the punishment previously imposed and forfeit a conviction on the weapons count." *Id.* at 161. Further, in addressing the obvious constitutional concerns inherent in its decision to allow venue, the court stated: "[W]e do not believe that our holding seriously infringes on the defendant's rights since this Court treats the right to venue with less deference than other constitutional rights." *Id.* at 162.

Thus, while the Ninth Circuit, relying heavily on the literal language of the Constitution and Rule 18 of the Federal Rules of Criminal Procedure, found the rights guaranteed by these provisions to outweigh concerns about judicial economy, the Fifth Circuit adopted a more pragmatic approach. The Ninth Circuit stated the tension between the two approaches this way:

> What the government is essentially arguing for is a rule of law allowing venue over a substantive crime committed in furtherance of a conspiracy in any district where venue is proper for the conspiracy charge. While such a rule might make some sense from a policy standpoint, it runs counter to the venue principles established by the Constitution, the Federal Rules of Criminal Procedure, and the federal courts.

Corona, 34 F.3d at 879.

Relying heavily on the rationale articulated in *Pomranz*, the government advances two arguments

for finding venue proper in this case. First, the government urges us to consider the cost of forcing duplicative trials. Had the government been forced to try Moreno on the gun charge in Maryland, it contends, its resources would have been dramatically strained because it would have also had to retry Moreno on the underlying predicate offense of kidnapping.

The government's second and related argument is that when determining venue, a court must look closely to "the nature" of § 924(c)(1). In other words, because a violation of § 924(c)(1) is dependent on the predicate offense—in this case, kidnapping—it would be illogical to require the § 924(c)(1) offense to be tried in a different venue.

We reject both of the government's arguments. Instead, we agree with the Ninth Circuit that to determine where venue should lie under § 924(c)(1) the "verb test" is the proper test.[4] Applying that test

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[4] For a discussion of the "verb test," see Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289 (1926) ("All federal crimes are statutory, and these crimes are often defined . . . in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed?"). *See generally United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine 'the key verbs in the statute defining the criminal offense' to find the scope of the relevant conduct.") (quoting *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980)); *United States v. Donahue*, 885 F.2d 45, 49 (3d Cir. 1989) ("[I]t is often helpful to look at the statutory verb in the description of the offense in determining where an offense was committed."); *United States v. Cofield*, 11 F.3d 413, 416 (4th Cir. 1994)

here, we find that § 924(c)(1) unambiguously designates the criminal conduct that is prohibited as "using" or "carrying" a firearm. It follows that one "commits" a violation of § 924(c)(1) in the district where one "uses" or "carries" a firearm. Accordingly, we conclude that because the crime committed by Moreno—*carrying* or *using* a firearm in relation to a crime of violence—occurred only in Maryland, Moreno could only have been properly tried in Maryland.

Contrary to the government's assertions, application of the verb test here would not cause it undue hardship. For example, our holding would not *prevent* the government from trying the predicate offense in any venue in which the § 924(c)(1) charge would be properly brought. Indeed, had the government wanted to try Moreno on all counts in a single trial, it certainly could have done so in Maryland.[5]

(noting that "we have adopted the 'verb test' as an interpretative aid"); *United States v. Murphy*, 117 F.3d 137, 139 (4th Cir. 1997) ("Where . . . Congress has not provided an express venue provision in conjunction with a criminal offense, this circuit has looked to the verbs defining the criminal offense and the purpose underlying the criminal statute to determine proper venue."); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997) (applying the "active verb" or "key verb" test to the Child Support Recovery Act); *United States v. Ryan*, 894 F.2d 355, 360 (10th Cir. 1990) ("Courts usually examine the verbs employed in the statute to define the offense.").

[5] The government argues that the count charging Moreno with kidnapping Mrs. Avendano could only have properly been tried in New Jersey or New York, thus precluding a consolidated trial. Because Moreno's violation of § 924(c)(1) was only related to the kidnapping of *Mr. Avendano*, the fact that he

Thus, the government overstates the potential hardship it would face if forced to try § 924(c)(1) violations in the venue where the gun was used or carried. Essentially, the government wants to have the *option* of venue—that is, it does not want to be *restricted* to trying these cases in the venue where the § 924 violation occurred.

Many constitutional guarantees for criminal defendants are inefficient and costly—the right to counsel comes to mind. Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away. *See United States v. Johnson*, 323 U.S. 273, 276, 65 S. Ct. 249, 251, 89 L.Ed. 236 (1944) ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy. . . ."). Thus, here, where the statute does not indicate the location of the crime for purposes of determining venue, we must strictly construe the verbs that define the criminal conduct to ensure that the defendant's Sixth Amendment rights are protected.[6]

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committed a separate crime of kidnapping *Mrs. Avendano* is not particularly relevant to our venue analysis.

[6] The parade of horribles offered by the dissent to demonstrate the inadequacies of the "verb test," while perhaps compelling on its own terms, has no application in the context of this case. Although there may be statutes in which the verbs defining the criminal conduct are ambiguous, 18 U.S.C. § 924(c)(1) is not such a statute. *Cf. United States v. Angotti*, 105 F.3d 539, 542 (9th Cir. 1997) (noting that the *Corona* court "quite logically" held that "the crime of distribution of narcotics is committed in the district where the narcotics are distributed").

While of course, Congress cannot abrogate the venue guarantee altogether, it can define a crime broadly such that commission of that crime will likely cross state borders. *See* Charles A. Wright, *Federal Practice & Procedure* § 302, at 201 (2d ed. 1982). For example, 18 U.S.C. §§ 659 & 660 allow the government to indict an individual for "stealing" from interstate commerce in any district in which the individual "possessed" the proceeds of the theft. *See id.* Congress can also explicitly provide a venue provision for any given offense, as long as the venue bears some relation to the offense.[7] But where, as here, Congress has not explicitly indicated an intention to allow multiple venue actions, we remain guided by the strict language of the Constitution. *See Anderson*, 328 U.S. at 703, 66 S. Ct. at 1216 (holding that when "nothing in either the statute or the legislative history . . . show[s] an intention on the part of Congress to depart from the Sixth Amendment's command," courts must look to the nature of the crime and where it was committed to determine venue); *United States v. Barsanti*, 943 F.2d 428, 434 (4th Cir. 1991) ("Congress did not expressly provide for venue in 18 U.S.C. § 1001; therefore, we must look to the verbs of the statute for guidance.").

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[7] For example, Congress has provided for continuing offenses to be tried "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). And, murder offenses may be tried in any district "where the injury was inflicted . . . without regard to the place where the death occurs." 18 U.S.C. § 3236.

In the specific context of § 924(c), Congress could have drafted the statute to allow venue to lie in any district where the government could properly bring the related crime of violence or drug trafficking offense.[8] Congress did not do so. Without such an explicit expression of congressional intent, we decline the government's invitation to construe liberally the venue requirement.

Because Moreno only used or carried the gun in Maryland and because that conduct constitutes the substantive offense under § 924(c)(1), venue in New Jersey was improper. Accordingly, we reverse Moreno's conviction under § 924(c)(1) for lack of venue.

B. *Rule 404(b) Evidence*

Defendants Montalvo, Pacheco, and Quinones argue that the district court abused its discretion in allowing the admission of "other crimes" evidence of previous drug transactions.[9] Specifically, the defendants attack the admission of testimony from Avendano, the kidnapping victim, and Lopez, the drug courier, regarding the thwarted fourteen-kilo cocaine deal. Defendants also challenge the admission of Lopez's testimony about the five drug transactions that preceded the fourteen-kilo deal. According to defendants,

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[8] Indeed, the dissent artfully suggests just how such a statute might be written. *See* Dissent at [App., *infra* 43a-44a].

[9] Evidence of the prior cocaine transactions was not admitted against Quinones at trial. His argument is better understood as objecting to the district court's refusal to sever his trial from the other defendants. In essence, Quinones claims that his trial should have been severed *because* evidence of the prior deals was admitted against his codefendants.

they were prejudiced by the admission of this evidence in violation of Rule 404(b) of the Federal Rules of Evidence, which prohibits the admission of prior bad acts when used to portray a defendant as a "bad person." Because the fourteen-kilo deal was admitted solely to portray the defendants as drug dealers and, thus, "bad people," defendants contend that it was improperly admitted.

Initially, we must determine whether evidence of the prior cocaine transactions was probative of the charged conduct, rather than merely probative of the defendants' character. *United States v. Sriyuth*, 98 F.3d 739, 745 (3d Cir.1996).

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Fed. R. Evid. 404(b).

Thus, for "other crimes" evidence to be admitted, it must be logically relevant, under Rules 404(b) and 402, to any issue other than the defendant's propensity to commit the crime, and its probative value must outweigh its prejudicial effect. *United States v. Himelwright*, 42 F.3d 777, 781 (3d Cir. 1994). Because trial courts have substantial leeway in making evidentiary rulings, we review a district court's decision to admit 404(b) evidence for abuse of discre-

tion. *Id.* When, however, a district court does not offer reasons for its evidentiary rulings, we need not defer to the reasoning of the district court. *Id.*

1. ***The Fourteen-Kilo Deal.***

When the government first sought to introduce the fourteen-kilo cocaine deal, it offered it as part and parcel of the drug conspiracy count of the indictment. According to the government, the original fourteen-kilo deal was part of the charged drug conspiracy because all of the players were identical to the players in the thirty-kilo deal: Montalvo and Pacheco were the sellers; Avendano was the middleman; and Ochoa was the buyer. Under the government's theory, because the first fourteen-kilo deal was thwarted when the courier, Lopez, was arrested by police, Montalvo was eager to "up the ante" on the next deal.

The district court, however, expressed unwillingness to consider the fourteen-kilo deal as part of the same conspiracy as the subsequent thirty-kilo deal because the indictment only charged a conspiracy to distribute thirty kilos of cocaine. Instead, the district court urged the government to introduce the fourteen-kilo deal as 404(b) evidence.

Consequently, the government introduced the fourteen-kilo deal, offering the following reasons to explain why it qualified under Rule 404(b):

> [I]t provides the background and an explanation of the relationship between Mr. Montalvo, Mr. Pacheco, and Mr. Lopez. . . . There's an overlap in the 14 kilogram transaction because that overlaps to Mr. Ochoa, the guy who stole the 30 kilos

> in this case, and Avendano, who was intended middleman in the 14 and the 30. It also shows a method of operation. It also shows the planning and preparation in terms of having a car prepared to conceal these drugs. It's sort of a test run, so to speak, Your Honor, to take it for a distance from A to B, which is very short and then follow it up with a matter of days and take it interstate from Houston towards New York.

J.App. at 93-94.

Presumably adopting the government's analysis, the district court admitted the prior drug deal:

> I don't have any difficulty with that whatsoever. The probative value of that is not substantially outweighed by the danger of any kind of unfair prejudice. I've ruled on that. Absolutely clear. Classic 404(b).

J. App. at 94.

We can infer that the district court adopted the government's proffered reason for admitting the fourteen-kilo deal as 404(b) evidence. *See United States v. Sampson*, 980 F.2d 883, 888 (3d Cir. 1992) (stating that a district court's summary conclusion to admit 404(b) evidence may be sufficient if the government thoroughly explains its proffered reason for offering it). We agree that the government has sufficiently shown that the fourteen-kilo deal was a link in a chain of events that led to the charged conduct and not merely evidence that the defendants were more likely than not to have committed the charged conduct. Thus, we conclude that the district court properly determined that the fourteen-kilo cocaine deal

qualified as "other crimes" evidence under Rule 404(b).

Unfortunately, it is more difficult to decipher the reasoning of the district court with regard to the balancing analysis required by Rule 403.[10] The district court merely stated a conclusion that the probative value of the evidence outweighed its prejudicial effect. Although the district court may have in fact engaged in Rule 403 balancing, it did not articulate on the record a rational explanation. *See Government of Virgin Islands v. Harris*, 938 F.2d 401, 420 (1991). Thus, we need not defer to the district court and can conduct the requisite balancing analysis ourselves. *Himelwright*, 42 F.3d at 781.

In our view, while the fourteen-kilo deal may have had some prejudicial effect on Montalvo and Pacheco, the evidence of the deal was substantially relevant to the government's case against the defendants to outweigh any risk of prejudice. Indeed, the fourteen-kilo deal went to the heart of the government's theory of the case: The government contended that the thirty-kilo deal, which led to the kidnapping, was set up to offset the loss caused by the thwarted fourteen-kilo deal.

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[10] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

In addition, the district court gave explicit limiting instructions to the jury immediately after Lopez's testimony, which described the fourteen-kilo deal.[11] This limiting instruction mitigated any potential prejudice against Montalvo and Pacheco. *See Sriyuth*, 98 F.3d at 748 (recognizing that unfair prejudice can be minimized by a limiting instruction). In other words, the limiting instruction sufficed to enable the jury to compartmentalize the evidence and consider it only for its proper purpose. *Id.* (citing *United States v. Driggs*, 823 F.2d 52, 54 (3d Cir. 1987)).

Thus, in our view, the evidence of the fourteen-kilo deal was highly probative to show method of operation and preparation, while the prejudicial effect was minimal. Accordingly, the fourteen-kilo deal was properly admitted as "other crimes" evidence under Rule 404(b).

2. *The Five Prior Drug Transactions.*

The defendants also object to the admission of five prior cocaine deals. The government offered evidence, through the testimony of Lopez, of five prior cocaine transactions purportedly to show Lopez's relation-

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[11] Specifically, the court instructed the jury to:

> Use this evidence to decide whether or not defendant Montalvo and defendant Pacheco had knowledge of the drug conspiracy charged in the indictment and intended to participate in. Should you choose to believe the evidence of these other cocaine transactions you've heard this afternoon, I caution you, you may only use it for these limited purposes. You may not use it to prove that defendant Montalvo and defendant Pacheco are bad persons or that they were predisposed to do bad things. . . .

J. App. at 281-82.

ship with Montalvo and Pacheco. In addition, the government contended that Lopez's testimony about the prior deals was probative to rebut Montalvo's and Pacheco's claim of noninvolvement with Lopez. Lopez, however, had absolutely no involvement with the charged drug conspiracy—that is, the thirty-kilo cocaine deal. The defendants therefore argue that the five prior deals did not relate to anything at issue in the case.

Although it is clear that the district court found the evidence to be "classic 404(b)," it is unclear from the record whether the district court conducted a balancing analysis under Rule 403. J. App. at 94. The district court judge merely stated that: "[T]hat's other crimes evidence. I already told you, I balanced—I balanced that last night, I certainly couldn't see the fourteen kilos as part of this transaction, but I think it's appropriate other crimes evidence." J. App. at 101. Moreover, the district court discussed the prior five deals as part and parcel of the fourteen-kilo deal, rather than as separate 404(b) evidence. Again, because the district court did not offer reasons for its ruling, we must engage in Rule 403 balancing as to the five prior deals ourselves. *See Himelwright*, 42 F.3d at 781.

While the evidence of the five prior deals clearly shows a relationship between Montalvo and Pacheco, we question whether that evidence had much probative value because the relationship between Montalvo and Pacheco had already been established by the fourteen-kilo deal. On the other side of the scale, however, the risk of prejudice to the defendants by introducing that evidence was significant. Through

its admission, the government may have been able effectively to convey to the jury that Montalvo and Pacheco were career drug dealers and "bad people."

Nevertheless, we find it unlikely that "any prejudice resulting from the admission of [the 404(b) evidence] . . . 'cause[d] the jury to base its decision on something other than the established propositions in this case.'" *United States v. McGlory*, 968 F.2d 309, 339 (3d Cir. 1992) (citing *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)). In other words, given that the five prior deals were relatively small scale and that evidence of the fourteen-kilo deal had already been properly admitted, the admission of the five prior deals likely had no effect on the jury's decision. Accordingly, while we are concerned with the district court's failure to explain its reasons for admitting the five prior cocaine deals, we do not think that the admission of that evidence rises to the level of reversible error.

C. *Severance*

Moreno, Palma-Ruedas, Ortiz, and Quinones contend that the district court abused its discretion in refusing to sever their trials from the trial of Montalvo and Pacheco. Specifically, Moreno, Palma-Ruedas, Ortiz and Quinones claim that the district court wrongly balanced the prejudice to the defendants against the advantages of joinder.

In reviewing orders denying motions to sever, we look to the record as it existed when the motion was made, what trial developments were then reasonably foreseeable, and in that light decide whether the district court abused its discretion in denying the

severance motion. *United States v. Sandini*, 888 F.2d 300, 305-06 (3d Cir. 1989); *United States v. Console*, 13 F.3d 641 (3d Cir. 1993).

In general, we favor joint trials for defendants who are indicted together. *See Zafiro v. United States*, 506 U.S. 534, 537, 113 S. Ct. 933, 937, 122 L.Ed.2d 317 (1993); *United States v. Balter*, 91 F.3d 427, 432 (3d Cir. 1996). The defendants acknowledge this preference but, nevertheless, claim that evidence of the drug conspiracy admitted against Montalvo and Pacheco was so overwhelming that it "spilled over" to them.

As the Supreme Court noted in *Zafiro*, courts should grant a severance motion "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 538-39, 113 S. Ct. at 937-38. Such a risk may occur "when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id.* at 539, 113 S. Ct. at 938. According to defendants, that is exactly what happened in this case. That is, Moreno, Palma-Ruedas, Ortiz, and Quinones contend that the jury could not possibly have compartmentalized the drug evidence admitted against Montalvo and Pacheco, even with explicit limiting instructions.

When Moreno, Palma-Ruedas, Ortiz, and Quinones moved to sever, the district court had before it only an indictment charging all six defendants with conspiracy to kidnap and distribute drugs. Thus, *when the*

motion was made, the district court had no reason to believe that Moreno, Palma-Ruedas, Ortiz, and Quinones were situated any differently with respect to the drug conspiracy than Montalvo and Pacheco. Moreno, Palma-Ruedas, Ortiz, and Quinones contend, however, that their severance argument is bolstered, retrospectively, by the fact that, at the conclusion of the government's case, the district court acquitted the defendants of the drug conspiracy charge pursuant to Rule 29. Yet, as the government properly points out, even if these defendants had been tried separately, evidence of the thirty-kilo drug deal would have been admissible against each of them to prove motive for the kidnapping charge. In other words, some evidence relating to a drug transaction—indeed, the largest transaction—was relevant to all of the charges and all of the defendants. Thus, we are unpersuaded by the defendants' contention that their trials were "tainted" by the association with drugs.

Moreover, even if we were to find that the district court abused its discretion in denying the severance motion, the defendants must still pinpoint "clear and substantial prejudice," which resulted in an unfair trial. *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991). We are convinced that by instructing the jury that evidence of the prior drug transactions—specifically, evidence of the fourteen-kilo deal and the five smaller deals—was to be considered only against Montalvo and Pacheco, the district court took sufficient steps to cure any prejudice caused by admission of that evidence. *See Zafiro*, 506 U.S. at 539, 113 S. Ct. at 938 (noting that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice"). Accordingly, we conclude that

defendants have not shown clear or substantial prejudice as a result of the district court's denial of their severance motion.

D. *Variance*

Ortiz, Moreno, and Palma-Ruedas argue that their convictions should be vacated because there was a variance between the indictment and the proof at trial, to the prejudice of the their substantial rights. *See Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946); *United States v. Salmon*, 944 F.2d 1106, 1116 (3d Cir. 1991) (noting that under *Kotteakos*, "a conviction must be vacated where a variance between the indictment and proof at trial exists to the prejudice of a defendant's substantial rights"). Ortiz, Moreno, and Palma-Ruedas contend, through a creative reading of the indictment, that the government actually charged one broad conspiracy but at trial presented proof of multiple conspiracies. Specifically, they contend that there was a variance between the indictment and the proof offered at trial because they were charged with a cocaine conspiracy but convicted of a kidnapping conspiracy. We reject this argument.

The second superseding indictment charged Ortiz, Moreno, and Palma-Ruedas with conspiracy to distribute cocaine *and* conspiracy to kidnap. J. App. at 20. At trial, the existence of those two conspiracies was proven. While true that Ortiz, Moreno, and Palma-Ruedas were convicted only of the kidnapping conspiracy, the fact that they were acquitted of one of the conspiracies does not establish a prejudicial variance. On the contrary, the defendants were indicted on a kidnapping conspiracy and convicted on a

kidnapping conspiracy; thus, there is no variance here.

E. *Sufficiency of Evidence to Convict Quinones*

Quinones argues that his convictions should be reversed because the evidence against him was insufficient to support a guilty verdict. Specifically, he argues that the government failed to show that he had knowledge of the objectives of the drug and kidnapping conspiracies or that he willingly entered into such conspiracies.

In determining whether to sustain a conviction, we view the evidence in the light most favorable to the government and determine whether a trier of fact could have found each element of the charged offense beyond a reasonable doubt. *United States v. Schramm*, 75 F.3d 156, 159 (3d Cir. 1996). In short, we "will reverse for insufficient evidence only where the failure of the prosecution is clear." *Government of the Virgin Islands v. Isaac*, 50 F.3d 1175, 1179 (3d Cir. 1995).

On a conspiracy charge, the government need not prove conspiratorial intent through direct evidence. Rather, the government can rely "entirely on circumstantial evidence to prove that an alleged conspirator had the knowledge and intent necessary to commit the crime." *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1994). Here, the government presented testimony that Quinones was present at the initial meeting in November of 1994 between Avendano and Montalvo, in which they discussed negotiating a possible deal with Ochoa. The government also showed that Quinones travelled with all of the kidnappers and

Avendano from Quinones's house in New York to Maryland. Moreover, it was established that Quinones was present when Moreno threatened Avendano with the .357 magnum and that Quinones made an attempt to escape when the police entered the Maryland house.

From all of these circumstantial facts, a reasonable juror could infer that Quinones knowingly and intentionally participated in the drug and kidnapping conspiracies. Accordingly, we conclude that the evidence was sufficient to support Quinones's conviction on all counts.

F. *Speedy Trial Act*

Moreno filed a supplemental pro se brief alleging that the government violated his right under the Speedy Trial Act to be charged by indictment within thirty days after being arrested or served with a complaint.

The Speedy Trial Act, 18 U.S.C. § 3161(b), requires that:

> Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

Moreno contends that his conviction on the § 924 count should be reversed because the government did not indict him on this count within thirty days of his initial arrest. As the government properly points out, however, Moreno was not charged upon arrest with violating § 924. Rather, he was initially charged on

that count through a formal, superseding indictment. Section 3161(b) plainly states that it only applies if the arrest was made "in connection with such charges." Because Moreno had already been arrested on charges stemming from the first indictment, there was no arrest in connection with the § 924(c)(1) charge. Accordingly, the thirty-day time limit does not apply. *See United States v. Beal*, 940 F.2d 1159, 1162 (8th Cir. 1991).

Moreover, Moreno failed to move for dismissal of the indictment prior to trial. Section 3162(a)(2) of the Speedy Trial Act clearly states: "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). *See also United States v. Patten*, 826 F.2d 198, 199 (2d Cir. 1987) (per curiam) (rights under Act waived when defendant did not request dismissal until after jury selection began); *United States v. Jernigan*, 20 F.3d 621, 622 n. 2 (5th Cir. 1994) (rights under Act waived when defendant did not move for dismissal prior to trial). Accordingly, we reject Moreno's Speedy Trial Act claim.

G. *Suppression*

Montalvo, Pacheco, Quinones, Moreno, and Palma-Ruedas claim that the district court erred by failing to suppress the evidence seized at the Maryland residence. Specifically, the defendants contend that there was insufficient probable cause to support a search warrant.

Defendants' claim is without merit. When the police came to the house in Maryland, they were able to

corroborate Mr. Avendano's story through the police in New Jersey. Thus, the magistrate clearly "had a 'substantial basis for . . . concluding' that a search would uncover evidence of wrongdoing." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L. Ed. 2d 697 (1960)). Accordingly, there was sufficient probable cause to support a search warrant.

Moreover, even if the warrant was not supported by sufficient probable cause, suppression would be inappropriate because the police reasonably relied on the warrant. *See United States v. Leon*, 468 U.S. 897, 920-22, 104 S.Ct. 3405, 3419-20, 82 L.Ed.2d 677 (1984); *United States v. Williams*, 3 F.3d 69, 74 (3d Cir.1993). Accordingly, the district court properly admitted the evidence seized from the Maryland house.

H. *Admission of Hearsay Testimony*

When the defendants were at the house of Quinones in New York, a police detective came to the door to check on a suspicious car in the driveway. Rosemary Alvarez, Quinones's wife, answered the door with Montalvo. At trial, the police detective testified that Alvarez told him that Montalvo was "Carlos Torres."

Montalvo objects to the admission of the detective's testimony, claiming that it was inadmissible hearsay. Whether evidence is hearsay is a question of law subject to plenary review. *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993).

We agree with the district court that the detective's testimony was not hearsay. The testimony was

not introduced to prove that Montalvo really was "Carlos Torres"—i.e., it was not admitted to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Rather, the testimony was offered to show consciousness of guilt and to show that the statement was, in fact, false. *See United States v. Levy*, 865 F.2d 551, 558 (3d Cir. 1989) (in banc) (noting that "defendants' attempt to conceal their true identities by providing aliases to the police upon arrest is relevant as consciousness of guilt"); *Anderson v. United States*, 417 U.S. 211, 219-20, 94 S. Ct. 2253, 2260, 41 L.Ed.2d 20 (1974) (holding that statements were not hearsay when admitted "to establish a foundation for later showing, through other admissible evidence, that they were false") (citations omitted).

Even though Montalvo did not offer the information himself, he allowed Alvarez to offer the false statement without correcting her. The statement was thus probative regarding consciousness of guilt because the jury could have reasonably inferred that Montalvo welcomed Alvarez's misidentification of him. J.App. at 313. Further, we agree with the district court that the admission of the statement was not prejudicial. Thus, we conclude that the district court properly admitted the testimony of the detective.

I. *Evidence of Montalvo's Past Name*

Montalvo argues that the district court abused its discretion when it allowed the government to ask Montalvo's former mother-in-law on cross-examination whether she had ever known Montalvo by any other name. On direct examination, Montalvo's mother-in-law repeatedly referred to Montalvo as

"Omar." On cross, the prosecutor asked whether she had ever known Montalvo by any other name. She replied that she had known him as "Rubin Tascon" and that, in fact, "Rubin Tascon" was the name that appeared on her daughter's marriage certificate.

The trial court enjoys "sound discretion" in determining the scope of cross-examination. *United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991). Here, the district court, after considering Montalvo's objection, determined that the prosecutor could elicit testimony tending to prove that Montalvo's mother-in-law did not normally refer to him as Omar. The testimony was probative because it tended to support the inference that Montalvo knew he was breaking the law and was trying to hide behind an alias. *See Levy*, 865 F.2d at 558. In addition, we agree with the district court's determination that the witness's reference to Montalvo's "real name"—Rubin Tascon—was not unduly prejudicial. Accordingly, the district court did not abuse its discretion in allowing the government to make this point on cross-examination.

J. Government's Reference in Closing to Montalvo's Past Names

Montalvo claims that he was denied a fair trial because the government referred, in closing, to Montalvo's past names. Because Montalvo made no objection to the prosecutor's closing at trial, he is required to show plain error. *United States v. Anderskow*, 88 F.3d 245, 249 (3d Cir.1996); *see also United States v. Price*, 76 F.3d 526, 530 (3d Cir. 1996) (defining plain error as "'egregious error or a manifest miscarriage of justice'"). We conclude that Montalvo cannot show plain error as required.

In closing, the government referred to "Carlos Torres" and "Rubin Tascon" as names previously used by Montalvo. Yet, as discussed in the previous section, both of these past names had already been submitted to the jury through the testimony of witnesses. Because we have concluded that the district court did not abuse its discretion in admitting evidence of Montalvo's aliases through the testimony of witnesses, we can hardly conclude that the government's reference to these names in closing rose to the level of plain error.

K. Exclusion of Hearsay Testimony of Marilyn Hernandez

Quinones argues that the district court committed reversible error when it refused to admit the testimony of Marilyn Hernandez regarding the meeting between Avendano, Montalvo, and Quinones. The defense attempted to admit Hernandez's statement that when Montalvo introduced Avendano to Quinones at Quinones's house on January 1, 1995, Quinones said, "Nice to meet you." Quinones's theory was that this statement tended to rebut Avendano's contention that Quinones was at the initial meeting with Montalvo and Avendano in November 1994, and that the statement showed that Quinones did not know that Avendano was being held against his will.

The district court excluded the testimony as hearsay. Quinones argues that the statement was not hearsay because it was not being offered to prove the truth of the statement. *See* Fed. R. Evid. 801(c). In the alternative, he argues that even if the statement was hearsay, it was admissible under Rule 803(3),

which allows the admission of statements of the declarant's then existing state of mind. *See* Fed. R. Evid. 803(3). Thus, the first question is whether or not the statements regarding the meeting between Quinones and Avendano were offered to prove the matter asserted—i.e., that Quinones and Avendano had never met before January 1, 1995.

The district court found that the statements were offered precisely to prove the truth of the matter asserted—that is, that Quinones and Avendano did not know each other. Quinones makes a hypertechnical, syntactic argument by asserting that the relevance of the statement was not that Quinones really thought that "it was nice" to meet Avendano but, rather, merely that the statements were said. Quinones's counsel, however, undermined this argument in closing when he asserted that Quinones could not have been at the November 1994 meeting "because they never met before January 1, 1995." J.App. at 559; *see United States v. Sallins*, 993 F.2d 344, 347 (3d Cir. 1993) (noting that defense counsel's use of the statement for its truth in closing argument confirms that the statement was inadmissible hearsay). While Quinones may not have offered the statement for its express meaning, he did offer it for the implied assertion that he had never met Avendano. Statements offered to support an implied assertion are inadmissible hearsay. *See United States v. Reynolds*, 715 F.2d 99, 104 (3d Cir. 1983).

Nor are we convinced by Quinones's argument that the statement fell within Rule 803(3)'s exception to the hearsay rule. Statements admitted to show state of mind under Rule 803(3) "cannot be offered to prove

the truth of the underlying facts asserted." *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1274 (3d Cir. 1995).

Moreover, even if the statement was admissible, its omission did not constitute prejudicial error. The district court allowed the inference that the defense hoped to get across by allowing Hernandez to testify that in her opinion Quinones and Avendano were meeting for the first time. J.App. at 396. Further, as noted earlier, defense counsel was able to refer to the excluded statement in closing. J.App. at 542, 551, 558-59. Thus, because defense counsel was able to get the point across to the jury anyway, the district court's ruling, if error, was harmless.

L. *District Court's Comments on Defense Witness Testimony*

Quinones further argues that the district court's response to the testimony of Marilyn Hernandez served to undermine her credibility and unfairly prejudice Quinones. As such, Quinones claims that the district court's failure to remain neutral and detached constitutes plain error. We are unpersuaded.

When reviewing for plain error, we look for errors that "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States v. Price*, 13 F.3d 711, 724 (3d Cir. 1994) (quoting *United States v. Young*, 470 U.S. 1, 16, 105 S. Ct. 1038, 1041, 84 L.Ed.2d 1 (1985)). In response to defense counsel's repeated attempts to elicit hearsay testimony from Hernandez, the judge commented out of frustration: "This is so bizarre." In our view, this statement is nothing more than a benign reflection of

the judge's reaction to defense counsel's persistence. *See United States v. Beaty*, 722 F.2d 1090 (3d Cir. 1983) (upholding defendant's conviction when judge's actions reflected "frustrat[ion] by counsel's repeated attempts to do that which he had properly been forbidden to do"). In any event, the judge immediately apologized to the jury, *see* J. App. at 397, and later instructed the jury to disregard any comments that she may have made with regard to witness testimony, reminding them that they were "the sole judges of the credibility of the witnesses." Supp. App. at 192, 196-97. Thus, we conclude that the judge's actions did not "reach the point where it appear[ed] to the jury that the court believe[d] the accused [was] guilty." *Price*, 13 F.3d at 723. Accordingly, we find no plain error.

M. *Guard's Remark Regarding Defendant's Incarceration*

Finally, Palma-Ruedas argues that a court guard impermissibly conveyed to the jury that he was incarcerated, in violation of his due process right to a fair trial. *See Estelle v. Williams*, 425 U.S. 501, 503-05, 96 S. Ct. 1691, 1693-95, 48 L.Ed.2d 126 (1976) (Fourteenth Amendment rights of defendant violated when compelled to stand trial before jury while dressed in identifiable prison clothes). We find that the guard's remark here falls far short of the due process violation discussed in *Estelle*.

On the seventh day of the trial, Palma-Ruedas's lawyer told the district court that in the morning, as she was coming into the courthouse with two jurors, a court security officer told them: "You can't go down yet, your packages are not here." One juror responded, "What packages?" The officer responded, "The packages, if you catch my meaning."

Palma-Ruedas claims that the guard's random remark tainted the jurors and, accordingly, that his convictions should be reversed. At trial, Palma-Ruedas noted to the district court only that he "wanted to put it on the record" and asked for no specific relief. In other words, Palma-Ruedas did not ask for a mistrial, nor did he ask the court to look into the matter further. Palma-Ruedas's failure to seek relief is telling because it tends to show that, at the time, Palma-Ruedas did not think the guard's remarks were particularly damaging to his fair trial rights. *See United States v. Colletti*, 984 F.2d 1339 (3d Cir. 1992) (noting that defendant's failure to ask for correction at trial supports the "inference that . . . the incident was not nearly as significant as the present argument would suggest").

In any event, we are not convinced that the guard's remark was unduly prejudicial. Indeed, we find it unlikely that the jurors even had any idea what the guard was talking about; jurors are not usually well-versed in the jargon of courthouse guards. Moreover, even assuming the jurors understood the guard's oblique reference, in our view, this random remark to two jurors is insufficient to constitute a violation of Palma-Ruedas's due process rights to a fair trial. *See United States v. Villabona-Garnica*, 63 F.3d 1051, 1058 (11th Cir. 1995) (distinguishing *Estelle* where the prison clothing was a "constant reminder" to the jury that the defendant was incarcerated, from defendant's remark on cross-examination that he was incarcerated).

For the foregoing reasons, we reverse Defendant Moreno's § 924(c)(1) conviction for improper venue. We affirm the defendants' convictions in all other respects.

ALITO, Circuit Judge, concurring in part and dissenting in part:

I join the opinion of the court except insofar as it reverses Moreno's conviction under 18 U.S.C. § 924(c)(1) on the ground that venue in the District of New Jersey was constitutionally impermissible. The majority reaches this result based on the so-called "verb test." Applying this test, the majority holds that a violation of 18 U.S.C. § 924(c)(1) may be prosecuted only where the defendant used or carried the firearm and not where the defendant committed the underlying crime of violence or drug trafficking crime. *Accord United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994).[1]

I disagree with this analysis and conclusion. Instead of relying solely on the "verb test," I think that we should inquire where, in substance, the offense

[1] Although the majority interprets the Constitution's venue provisions as embodying the "verb test," the majority seems to suggest (a) that *Congress* can bypass the verb test by specifying venue itself and (b) that this congressionally specified venue will pass constitutional muster "as long as the venue bears some relation to the offense." (Maj. Op. at 850) (footnote omitted). But if the majority is correct that the verb test is constitutionally mandated, how can Congress bypass it and specify venue in any place that merely "bears some relation to the offense"?

was "committed." United States Constitution, Art. III, sec. 2, cl. 3 & Amend. VI. In other words, we should make a realistic appraisal of the "nature of the crime" defined by the statute. *Cf. United States v. Anderson*, 328 U.S. 699, 703, 66 S. Ct. 1213, 1216, 90 L.Ed. 1529 (1946). When the offense created by 18 U.S.C. § 924(c)(1) is examined in this way, it is apparent that the commission of the crime of violence or drug trafficking crime is a critical element of the offense and that permitting venue in a district in which the commission of this underlying crime occurred is consistent with the Constitution's venue provisions.[2] *Accord United States v. Pomranz*, 43 F.3d 156, 161-62 (5th Cir. 1995);[3] *United States v. Friedman*, 1996 WL 612456, *6 (E.D.N.Y.).

I.

The criminal statute at issue here provides, in pertinent part, as follows:

> Whoever, *during and in relation to any crime of violence or drug trafficking crime* . . . for which he may be prosecuted in a court of the United States, *uses or carries a firearm*, shall, in addition to the punishment provided for such

[2] For convenience, I refer to Article III, section 2, clause 3 of the Constitution and the relevant provision of the Sixth Amendment as the Constitution's venue provisions. See footnote 6, *infra*.

[3] Although I agree with the holding in *Pomranz*, I do not endorse all of the reasoning in that opinion. Specifically, I do not think that the prosecution's convenience or inconvenience *per se* (*see* 43 F.3d at 161 n. 8) is a relevant factor in ascertaining the scope of the Constitution's venue provisions.

> crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .[4]

18 U.S.C. § 924(c)(1) (emphasis added). "[U]ses" and "carries" are verbs. "[D]uring and in relation to any crime of violence or drug trafficking crime" is a prepositional phrase. Under the majority's "verb test," venue is proper in only those districts in which occurred actions denoted in the relevant criminal statute by verbs. Accordingly, in this case, the majority concludes, the "verb test" restricts venue to the District of Maryland, where Moreno carried a firearm, and precludes venue in those other districts, including the District of New Jersey, through which the crime of violence, kidnapping, moved.

The verb test thus makes syntax constitutionally determinative. Consider the result that would follow if 18 U.S.C. § 924(c) were rephrased slightly as follows:

> Whoever ~~during and in relation to~~ **commits** any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States **and during and in relation to that crime** uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

This version is wordier than the original, but its meaning is the same. However, because of the addition of the verb "commits," the "verb test" would presumably permit venue in any district in which the

[4] The statute goes on to prescribe sentences of 10 or 30 years for cases involving certain types of firearms. *Id.*

crime of violence or drug trafficking crime was committed. I cannot believe that the meaning of the constitutional restrictions on venue turns on such syntactical trifles.

The apparent author of the "verb test," Judge Armistead M. Dobie of the Fourth Circuit, does not seem to have claimed any such office for his creation. In the article usually cited as the source of the test, Judge Dobie wrote:

> All federal crimes are statutory, and these crimes are *often* defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb *usually* contains the key to the solution of the question: in what district was the crime committed. Without the exact language of the statute, particularly this verb, paraphrases and loose citations in this field, are more than inaccurate, they are positively misleading. When, as is so often the case, the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and delusion to the unwary.

Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289 (1926) (emphasis added); *see also United States v. Walden*, 464 F.2d 1015, 1018 (4th Cir. 1972). As the quoted language demonstrates, Judge Dobie did not suggest that the verb test was "the proper" or "only" method to determine venue. He merely suggested that the verb test was "usually" the best method to determine venue. *Cf.* Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecu-*

tions: The Crime Committed Formula, 9 UCLA L. Rev. 751, 777 (1962) (verb test, although important, "constitutes only the first step" in determining venue).

II.

Article III, section 2, clause 3 of the Constitution provides that "[t]he trial of all Crimes, except in Cases of Impeachment . . . shall be held in the State where the said crimes shall have been *committed*" (emphasis added).[5] Similarly, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been *committed*" (emphasis added).[6] Is an offense "committed," for constitutional purposes, in only those places in which actions denoted by verbs occurred? Perhaps this is obvious to the majority, but it is not apparent to me. Thus, the constitutional text, by itself, does not seem to me to provide a sufficient basis for adopting the verb test.

Nor am I aware of other evidence that these constitutional provisions were meant to embody the verb test. On the contrary, the origin of these constitu-

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[5] Federal Rule of Criminal Procedure 18 echoes this command, providing that the "prosecution shall be had in a district in which the offense was committed."

[6] Strictly speaking, Article III, section 2, clause 3 concerns venue (where the trial occurs), whereas the Sixth Amendment concerns vicinage (where the jury is drawn). It has been said, however, that "[t]his technical distinction is of no importance." Charles A. Wright, 2 *Federal Practice & Procedure (Criminal)*, § 301 at 190 (1982 & 1996 Supp.).

tional provisions shows that they were adopted to achieve important substantive ends—primarily, to deter governmental abuses of power. *Cf. United States v. Johnson*, 323 U.S. 273, 276, 65 S. Ct. 249, 251, 89 L.Ed. 236 (1944) ("Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy. . . .").

"As the difficulties between the American colonies and Great Britain increased during the period immediately prior to the American Revolution, those in authority who represented the royal interests became concerned that royal interests could not be adequately protected in American courts, particularly when American colonists were charged with crimes." Drew L. Kershen, *Vicinage* 29 Okla. L. Rev. 803, 805 (1976). In 1769, despite warnings that such a measure might lead to war, Parliament revived an ancient statute under which American colonists accused of treason could be taken to England or another colony for trial. *See* William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 63-64 (1944); Kershen, *supra*, 29 Okla. L. Rev. at 805-06. During the next few years, Parliament enacted similar laws applicable to persons charged with offenses such as destroying dock yards, magazines, ships, ammunition, or supplies. Blume, *supra*, 43 Mich. L. Rev. at 63; Kershen, *supra*, 29 Okla. L. Rev. at 806-07. Resentment against these measures was so deep that the Declaration of Independence denounced King George III "[f]or transporting us beyond Seas to be tried for pretended offenses." This practice has been described as one of the precipitating factors of the American

Revolution. *See, e.g.*, Blume, *supra*, 43 Mich. L. Rev. at 63-67.

After the Boston Massacre, Parliament also passed a law, 14 Geo. III, c.39 (1774), designed to protect British soldiers who were charged in Massachusetts with capital offenses based on actions taken in suppressing riots or enforcing the revenue laws. Kershen, *supra*, 29 Okla. L.Rev. at 807. If it appeared to the governor that "an indifferent trial" could not be held in Massachusetts, the accused could be tried in England or another colony. *Id.* "This circumvention of the judgment of the victimized community was attacked as a 'Mock Trial' system in the Declaration of Independence." Akhil Reed Amar, *The Constitution and Criminal Procedure—First Principles* 243 n.163 (1997).[7]

Following independence, several states adopted constitutional provisions limiting a criminal prosecution to the place where the crime was "committed"[8] or where the "facts" "ar[o]se"[9] or "happen[ed]".[10] And a few years later, similar safeguards were placed in Article III, section 2, and the Sixth Amendment.[11]

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[7] The Declaration of Independence charged the king with "protecting [troops], by a mock trial, from Punishment for any Murders which they should commit on the Inhabitants of these States."

[8] N.H. Const. of 1784, art. I, § 17.

[9] Md. Const. of 1776, Declaration of Rights, art. 18.

[10] Mass. Const. of 1780, Part first, art. 13.

[11] At the Federal Constitutional Convention, several proposals were introduced to restrict venue to the state where the offense was "committed." *See* Francis Heller, *The Sixth Amendment* 22-24 (1951). These proposals engendered little debate, none of which seems to have focused on precisely what was meant by the place where an offense was "committed." *Id.* Likewise, debate on the Sixth Amendment did not elucidate this question. For a summary of this debate, *see* Kershen, *supra*, 29 Okla. L. Rev. at 817-28.

Justice Story explained the purpose of these provisions as follows:

> The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.

Joseph Story, *Commentaries on the Constitution* § 925 (Carolina Academic Press reprint 1987). Recent scholarship has suggested another possible purpose: to protect a community's right to have trials of local offenses occur in the community. *See* Amar, *supra*, 124 & n. 163.

Against this background, I reject the suggestion that the meaning of the constitutional venue provisions is to be determined by diagramming the language of the relevant criminal statute. Would the framers have thought that prosecuting an American colonist in England on a charge of treason was permissible if Parliament had been able to craft a treason statute in which a verb denoted an action occurring in

England? The answer is no. The constitutional venue provisions were meant to put in place important *substantive* protections against government abuse.

III.

The Supreme Court has never embraced the "verb test." Rather, the Court has instructed that venue must be determined by looking to "the nature of the crime" and the "location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703, 66 S. Ct. 1213, 1216, 90 L.Ed. 1529 (1946). *See also Travis v. United States*, 364 U.S. 631, 635, 81 S. Ct. 358, 361, 5 L.Ed.2d 340 (1961); *United States v. Cores*, 356 U.S. 405, 408, 78 S. Ct. 875, 878, 2 L.Ed.2d 873 (1958). Nor, as far as I can tell, has any court of appeals held that the "verb test" is the only proper test for determining where venue is constitutionally permitted. Most of the cases suggest that, while the "verb test" may provide a useful first cut at determining venue, there are complicated crimes for which a rigid grammar-based test may not be appropriate. *See, e.g., United States v. Cofield*, 11 F.3d 413, 417 (4th Cir. 1994) (examination of the verbs in a statute is not the exclusive method of determining venue; "there are crimes where the situs is not so simple of definition") (quoting *United States v. Billups*, 692 F.2d 320, 332 (4th Cir. 1982)); *United States v. Newsom*, 9 F.3d 337, 339 (4th Cir. 1993) ("the verbs examination method is not exclusive") (quotation omitted); *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992) (employing a "substantial contacts" test for determining venue); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188-89 (2d Cir. 1989) (same); *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980) (verb test is "[o]ne" method of determining venue). Indeed, even the Ninth Circuit, whose analysis and conclusion in *Corona* the majority follows, has explicitly disavowed a reading of *Corona* that would suggest that the verb test was "the" interpretive tool to be used in determining venue. *See Angotti*, 105 F.3d at 544 (leaving open the question whether "focus on key verbs should be the exclusive measure of venue").

IV.

Showing that rigid application of the "verb test" is wrong is simpler than setting out an alternative "test" that works in all cases, and I will not attempt to do the latter here. For present purposes, it is enough to show that in a prosecution under 18 U.S.C. § 924(c)(1) the commission of the crime of violence or drug trafficking crime is a sufficiently important element to permit venue in any district in which the defendant engages in that conduct.

It is apparent from the text of 18 U.S.C. § 924(c)(1) that the defendant's commission of the underlying crime of violence or drug trafficking offense forms a vital part of the evil that Congress sought to punish and prevent. Although 18 U.S.C. § 924(c)(1) has been held to create an offense distinct from the underlying crime, *see Anderson*, 59 F.3d at 1326, it is noteworthy that this provision prescribes the imposition of a penalty "in addition to the punishment provided for [the] crime of violence or drug trafficking crime." For this reason, 18 U.S.C. § 924(c)(1) has been described as constituting, at least in part, a "penalty enhancement statute." *Anderson*, 59 F.3d at 1326. This surely demonstrates that a central focus, if not *the* central focus, of the statute is the commission of

the underlying crime of violence or drug trafficking crime.

It is also telling that eight courts of appeals have held that "only one § 924(c)(1) violation can be appended to any single predicate crime." *Anderson*, 59 F.3d at 1328 (emphasis added); *see also United States v. Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994) (citing cases); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Sims*, 975 F.2d 1225, 1233 (6th Cir. 1992); *United States v. Moore*, 958 F.2d 310, 312 (10th Cir.1992); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992); *United States v. Privette*, 947 F.2d 1259, 1262-63 (5th Cir. 1991); *United States v. Fontanilla*, 849 F.2d 1257, 1258-59 (9th Cir. 1988); *but see United States v. Lucas*, 932 F.2d 1210, 1222-23 (8th Cir. 1991). If the use or carrying of the firearm were the heart of the offense and the commission of the underlying crime of violence or drug trafficking crime were a mere appendage that is insufficiently important to confer venue, these holdings would be hard to understand. Instead, one would expect these courts to have held that every single use or carrying of a gun in the context of a single drug crime or crime of violence would be a separate offense. The contrary holding by eight of the nine circuits to have addressed the issue reveals their understanding that the underlying predicate offense in Section 924(c)(1) is at the center of Congress's aim. *See Pomranz*, 43 F.3d at 160; *United States v. Taylor*, 13 F.3d 986, 993-94 (6th Cir. 1994) ("the predicate offense, not the firearm, is the object of s 924(c)(1)"); *United States v. Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993) (the "essence" of the offense was that the defendant used a firearm while committing another federal

crime); *but see Corona*, 34 F.3d at 880 (predicate drug crime during which the firearm was used was no more than a preparatory act and hence could not confer venue).

Moreover, a defendant is at least as likely to have significant ties to a place where he is alleged to have committed the crime of violence or drug trafficking crime as he is to have significant ties to the place where he is alleged to have carried or used the firearm. And a defendant's alleged commission of a crime of violence or drug trafficking crime is at least as likely to present a central issue at trial (thus making access to witnesses and proof important) as is the element of carrying or using a firearm. For these reasons, prosecuting a defendant under 18 U.S.C. § 924(c)(1) in a district in which the crime of violence or drug trafficking crime took place does not involve the type of government abuse that the constitutional venue provisions were meant to prevent.

Section 924(c)(1)'s legislative history confirms the critical importance of the element requiring proof that the defendant committed a crime of violence or drug trafficking offense. Representative Poff, Section 924(c)(1)'s sponsor, stated that this provision targeted "the *criminal* rather than the *gun*." *Anderson*, 59 F.3d at 1327 (citing 114 Cong. Rec. at 22,231 (1968)). He explained that the provision sought to persuade those individuals seeking to commit certain felonies "to leave [their] gun[s] at home." *Id.* at 1328 (citing 114 Cong. Rec. at 22,231). Indeed, he said that "the prosecution for the basic felony and the prosecution under my substitute would constitute *one proceeding out of which two separate penalties may*

grow." *Id.* at 1327 (citing 114 Cong. Rec. at 22,232) (emphasis added).

In sum, the predicate crimes defined in 18 U.S.C. § 924(c)(1), crimes of violence and drug trafficking crimes, are essential elements of the course of conduct that Congress sought to criminalize. I would hold, therefore, that venue for a prosecution under this statute lies in any district in which the defendant committed the underlying crime of violence or drug trafficking offense.

V.

If the majority's adoption of the "verb test" is taken seriously and applied in all future venue cases, it will lead to difficulties.

For one thing, we will have to delve into questions of grammar that most of us probably left behind in secondary school. The majority suggests that venue questions require us to identify the "key verbs" in the statute, but it is not clear precisely what it means by a "key verb," a term that I do not believe has grammatical significance. Does the term "key verb" mean a verb in the main clause? Or does it include any verb in a subordinate clause as well? This point recently divided the district court and the Fourth Circuit in applying the "verb test" to 18 U.S.C. § 228(a), which provides in pertinent part as follows (emphasis added):

> Whoever willfully *fails* to pay a past due support obligation with respect to a child who *resides* in another State shall be punished as provided in subsection (b).

The district court focused on the verb in the main clause ("fails") and held that venue was proper where the payment was ordered to be paid, as opposed to where the child resided. *Murphy v. United States*, 934 F.Supp. 736, 739-40 (W.D. Va.1996). Reversing, the Fourth Circuit pointed to the verb "resides" in the subordinate clause and concluded that venue was also proper in the district of the child's residence. *Murphy*, 117 F.3d at 139.

Whether or not a verb in a subordinate clause may qualify as a "key verb," I assume that a "verbal phrase," *i.e.*, a participial, gerund, or infinitive phrase, cannot qualify. As a grammar book explains:

> Verbals are so called because they are formed from verbs. In some respects they act like verbs. They may express action; they may have modifiers; and they may be followed by complements. In one important respect, however, they are not like verbs: verbals are not used as verbs in a sentence. They are used as other parts of speech—as nouns, as adjectives, or as adverbs.

John E. Warriner and Francis Griffith, *English Grammar and Composition* 40-41 (1973).

If my assumption is wrong—if verbal phrases can qualify as "key verbs"—then I challenge the majority to explain why it is proper to look to this type of noun, adjective, or adverb (*i.e.*, a verbal serving as a noun, adjective, or adverb) and not others. On the other hand, if this assumption is right, then the verb test will lead to some surprising results.

There are a great many federal criminal statutes that are phrased along the following lines: It shall be unlawful to do x. *See, e.g.*, 18 U.S.C. §§ 602, 603, 607(a), 795(a), 842, 922, 964(a), 1082(a), 1731, 1752(a), 1962, 2342. In all of these statutes, the "key verb," I take it, is "shall be"—which cannot possibly show where the offense was committed or where it should be prosecuted. The crux of the offense is expressed with an infinitive ("to do x") that functions as an adverb that modifies the adjective "unlawful." Is it proper under the "verb test" to rely on this adverbial phrase? If so, why is it not proper in the case before us to rely on the adverbial phrase "during and in relation to"?

Consider 18 U.S.C. § 922(g), a statute that, like 18 U.S.C. § 924(c)(1), deals with the subject of firearms possession. Section 922(g) provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance . . . ;
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien, illegally or unlawfully in the United States;

> (6) who has been discharged from the Armed Forces under dishonorable conditions;
>
> (7) who, having been a citizen of the United States, has renounced his citizenship; or
>
> (8) who is subject to [a certain type of court order restraining such person from, among other things, harassing, stalking, or threatening an intimate partner or his or her child]; or
>
> . . .
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

What are the "key verbs" in this statute? Is the only key verb the verb "shall be" in the main clause? Or do the verbs in the subordinate clauses qualify as well? If so, is venue proper where an accused "*has been convicted*" (§ 922(g)(1)), "*is* a fugitive" (§ 922(g)(2)), "*is* an unlawful" drug user or addict (§ 922(g)(3)), "*has been adjudicated* as a mental defective" or "*has been* committed to a mental institution" (§ 922(g)(4)), etc? Or is it permissible to look to the verbal phrases ("to ship or transport," etc.) as well?

Rather than relying on grammatical arcana, we should, as I have argued above, look at the substance of the statutes in question.

VI.

For these reasons, I would hold that venue in the District of New Jersey was proper, and I would therefore affirm Moreno's Section 924(c)(1) conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5163

UNITED STATES OF AMERICA

v.

JACINTO RODRIGUEZ-MORENO, A/K/A JOEL MORENO, JOEL MORENO-LLANOS, ARTURO TORRES CELORIO, JACINTO RODRIGUEZ-MORENO, APPELLANT

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges.

The petitions for rehearing filed by appellant, Jacinto Rodriguez-Moreno and by appellee, United States of America, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judges Becker, Stapleton, Greenberg, Scirica, Cowen and Alito would have granted rehearing.

BY THE COURT,

/s/ TIMOTHY K. LEWIS
TIMOTHY K. LEWIS
Circuit Judge

Date: SEPT 26, 1997

different statutes that expand venue, and 924(c) is not one of them.

That's my argument, Your Honor. Thank you.

THE COURT: It's a very interesting argument.

All right. Mr. Azzarello, why don't you respond to the extent you want to respond on this Count 5 argument now, or maybe we should have the benefit of that case before we deal with that.

MR. AZZARELLO: On the gun charge, Your Honor?

THE COURT: Yes, the gun charge.

MR. AZZARELLO: Yes, I—we just sent Mr. Howe over to locate that case and bring it back.

THE COURT: Yes.

MR. AZZARELLO: But I believe that that would resolve the issue, Your Honor, it was on all four's with this.

THE COURT: I'll have to take a look at the case. [10.44] I don't think there's anything more I could do with this.

MR. MC DONALD: I would agree. It resolves—it's a Fifth Circuit case. I mean certainly—there was—I can say to the court that we were not able to find any Third Circuit case on point.

THE COURT: Let's deal with Count 4. Because you've won on all the other counts for now.

MR. AZZARELLO: Your Honor, the Government's position is that, and a majority of

courts have held that attempt to secure payment for that past drug deliveries with the knowledge that they're drug related, effectively amounts to furthering the conspiracy to distribute narcotics.

There's a Second Circuit case, United States versus Atehorteva, A-t-e-h-o-r-t-e-v-a, 17 F.3d 546 at 5-

THE COURT: Let me get that. 17 F.3rd what?

MR. AZZARELLO: 546 at 551 (Second Circuit 1994).

Another case, United States versus Zolicoffer, Z-o-l-i-c-o-f-f-e-r, 869 F.2d 771 at 773, (Third Circuit 1989) with cert. denied at 4—504 U.S. 977, which cites to another Third Circuit case, United States versus Theodoropoulos, T-h-e-o-d-o-r-o-p-o-u-l-o-s, 866 F.2d 587 at 595, that's a Third Circuit 1989.

Your Honor, another case addressing this issue is United States versus Sepulveda, S-e-p-u-l-v-e-d-a, 15, F. [10.45] 3rd, 1161, 1174, that's a First Circuit 1993, with cert. denied at 2114 Supreme Court 2714.

Your Honor, in that case, Sepulveda, defendant was convicted on charges arising from participation in a cocaine distribution conspiracy where the evidence demonstrated that he served as a drug collector.

Your Honor, in Zolicoffer the defendant argued that there was insufficient evidence to establish that telephone calls, which were the basis of four convictions under 21 U.S.C. 843(b), facilitated the knowing and intentional distribution of

cocaine because they related to the attempt to collect the money owed to him by the buyer. In response to this argument, Judge Sloviter held that quote, "Telephone conversations relating to a drug debt can be viewed as facilitating the conspiracy to distribute." Citing United States versus Theodoropoulos, 866 Fed—

THE COURT: I don't take issue with that proposition. Especially when Judge Sloviter says it. I don't really take issue with that. I think this is somewhat distinctive.

MR. AZZARELLO: Your Honor, the Government position is that in this case, the defendants came in, defendants Moreno, Ortiz and Ruedas, for a two-fold purpose: One, to hold captive and maintain confinement and control over the Avendanos, Ephrain and then later Marbel Avendano, for that

Notes of Testimony, Trial, 7/27/95
(NT 11.5-11.6)

[11.5]

* * * * *

or with—of my client. I haven't really had a full opportunity to review that. There also were documents apparently that were seized from what the Government believes to have been his residence in Houston. That package is expected to be here by 10 o'clock and we should probably be able to review that once we have an opportunity.

THE COURT: It's late.

MR. SAVAGE: I would think that analysis will not take a great deal of time, but I'd like to have at least all of this information before—

THE COURT: Where is—where is that material coming from? Where is it coming to?

MR. AZZARELLO: Your Honor, from Houston DEA to the United States Attorney's Office here in Newark.

THE COURT: Get the lawyer to bring it with him. It should be here by?

MR. AZZARELLO: It should be here by 10 o'clock. We just sent a check—

THE COURT: Here?

MR. AZZARELLO: — across the street, we just sent Agent Hanko to see if it had arrived yet.

THE COURT: Okay. All right.

Let me get these outstanding matters on the Rule 29 out of the way.

Mr. McDonald, your argument with reference to Count [11.6] 5 is rejected. The Fifth Circuit case is on all fours with the argument you've raised. It's a very good argument, but I'm absolutely persuaded by that case, which I think was extremely well-reasoned, that venue is proper here.

That case, as this case, does not have a conspiracy to violate 924(c), and the Ninth Circuit case, which the defendant in the Fifth Circuit case raised, is not only factually distinguishable, but not well-reasoned in my view.

I, at 2 o'clock this morning, wrote a very brief opinion on the Count 4 claim, raised on the Rule 29, by defendants Palma Ruedas, Pedroza Ortiz and Rodriquez Moreno. It's rough, for obvious reasons, but I will now read it into the record.

It is, as a general proposition, and as the Government argues, a correct statement of the law that while the collection of drug monies does not constitute part of a drug distribution, it can constitute part of a conspiracy to distribute drugs. Stated somewhat differently, and as the cases put it, payment can be an integral and often final term in a drug distribution conspiracy.

There was no payment here for the 30 kilograms of cocaine which had been distributed. And, thus, I will assume that the distribution conspiracy had not ended when defendants Palma Ruedas, Pedroza Ortiz and Rodriquez Moreno

Notes of Testimony, Trial, 7/27/95
(NT 11.43-11.44)

[11.43]

first came on the scene.

(After a brief recess court resumed).

(In chambers).

THE COURT: I think before me start, let's schedule these closing statements. I really want to run a tight ship.

MR. TUMINELLI: We left them in the courtroom, John and I. We all talked. We had like a reasonable schedule.

THE COURT: The Government, five minutes.

MR. TUMINELLI: No, no.

Want me to run out and get it? I'll run out and get it, Judge.

THE COURT: Okay. Want to get started?

MR. MC DONALD: Why don't we get started now.

THE COURT: How do you want to do this? Want to go page by page, everybody just jump in?

MR. MC DONALD: I don't have much to say.

THE COURT: I wouldn't think there's much. I quickly flipped through it, there isn't much.

MR. AZZARELLO: We have—we just have one request, Judge.

THE COURT: Yes.

MR. AZZARELLO: And I apologize again for not having the case law and the language provided earlier in the instruction, but we're relying on a Second Circuit case and Supreme Court case for an instruction on kidnapping with [11.44] respect to force, that the force can be either physical in nature, physical restraint or mental restraint.

THE COURT: Yes.

MR. AZZARELLO: And that threat can either—

MR. ROCCO: The force can be actual or threatened and the restraint can be either physical or mental.

THE COURT: Okay.

Do you have that case for me?

MR. ROCCO: Yes.

MR. AZZARELLO: Yes.

THE COURT: Now, I think, as I put this together over a couple of days, I think it's a little more extensive than it has been. I don't think, for example, we have to go into—some of the words they use on the kidnapping, you know, inveigle, decoy, it's not part of this case.

MR. AZZARELLO: Judge, what does "inveigle" mean?

THE COURT: Handel—

MR. MC DONALD: Handel—entice to do something, lead astray.

MR. LAWRENCE: I don't think there's —there's no proof to that here.

THE COURT: No, I think we can take that out, put something like this in, it makes it more appropriate.

Similarly, when I get to the cocaine conspiracy to Count 4—I don't know, do we have to find constructive

Notes of Testimony, Trial 7/27/95
(NT 11.74-11.76)

[11.74]

as familiar with the word "thereafter" as we are.

THE COURT: Well, may be if that sentence is appropriate, it could go down in the bottom paragraph of the two, except the person referred to in the count is thereafter transported in interstate commerce while so seized and confined.

MR. MC DONALD: Okay.

THE COURT: That is that transportation followed the seizing.

MR. MC DONALD: The interstate transportation follows the kidnapping.

MISS KENNY: I would just note the case the Government just handed us, Boone, cites—

MR. MC DONALD: For that proposition.

MR. BALLAROTTO: You could tell them, if you find that he wasn't kidnapped until he was in Maryland, the verdict must be not guilty.

MR. AZZARELLO: Where do you see that line?

MISS KENNY: 15 and 17, the act is limited to inveiglement that amounted to kidnapping followed by interstate transportation.

THE COURT: I think the statute talks about followed by. That's not a secret.

MR. BALLAROTTO: No, it's very clear—

MR. MC DONALD: Judge, Chatwin, the case they just [11.75] gave us, has very interesting language in it, which is now vintage. It's a record, a 1945 case. I don't know if you want to charge it or not. I'd ask you to charge it and that is on page 406 of that case.

Now, there, in that case, there was no proof that the person was restrained, and she apparently indicated she was free to go at any time. It was a Mormon fundamentalist who enticed a 15 year old girl to become his wife, and there was a question of whether or not it was kidnapping.

What they talk about in there, if—she was perfectly free to leave the petitioners, when and if she so desired. In other words, the Government has failed to prove an act of unlawful restraint.

Now, in the case they stipulated, there apparently was a stipulation she was free to leave.

THE COURT: Yes.

MR. MC DONALD: Our position is going to be that these people were free to leave, and I would like a line somewhere in the kidnapping charge that if in fact you found he were free to leave, that it is not a kidnapping under the Federal Kidnap Act.

MR. ROCCO: That's in essence saying you haven't found a mental of physical restraint so—

MR. AZZARELLO: Yes

MR. SAVAGE: No, it's— [11.76]

THE COURT: Well, what if—what if there were physical or mental restraints, for a

period of time, and thereafter transported, thereafter free to leave. See? When he goes to buy the fish.

MR.BALLAROTTO: And the yogurt.

THE COURT: And the yogurt.

MR. ROCCO: Judge, the mental restraint would be the proofs support the fact, if you believe the threatened force—if the jury believes that there was this threat that the people in Medellin would be taken and people here would be taken—

THE COURT: Yes.

MR. ROCCO: — that's a continuing threat is the fact. That if you put in this language about free to leave in a case where there was no threat like that, that's why it's in Chatwin, it suggests that the opportunities that presented themselves physically to get up and walk away, somehow that would vitiate the threat. You know, it's threatened force and the mental restraint that was placed upon him.

THE COURT: What you're saying, it can only go one of two ways: If they don't believe there was a threat, they're acquitted?

MR. ROCCO: That is right.

THE COURT: All right.

Notes of Testimony, Trial, 7/31/95
(NT 13.45-13.48)

[13.45]

cocaine with the intent to distribute, and that during its lifetime a defendant became a member, then proof of the conspiracy as to that defendant is complete and you may find that defendant guilty of that charge. If you find the United States has not met its burden of proof, then you must find the defendant not guilty. Again, I remind you that in determining whether a defendant is guilty of conspiracy it does not matter whether he or his co-conspirators actually succeeded in possessing or distributing cocaine, the agreement to do so is the gist of the crime.

Finally, Count 5 charges defendant Jacinto Rodriquez-Moreno with using a firearm during a crime of violence. Three essential elements are required to be proved beyond a reasonable doubt in order to establish that defendant Jacinto Rodriguez-Moreno committed this offense. They are as follows:

First, that the defendant, Jacinto Rodriguez-Moreno, committed a crime of violence for which he might be prosecuted in a United States court;

Second, that during and in relation to that crime of violence the defendant used or carried a firearm; and

Third, that the defendant acted knowingly and willfully.

I will explain the first two elements in some detail, I have already defined "knowingly and

willfully" I [13.46] and I refer you to those instructions.

I instruct you that the kidnapping as charged in Counts 2 and 3 are crimes of violence, both of which are being prosecuted in this United States Court, as required, to satisfy the first element of Count 5. If you have found defendant Rodriguez-Moreno not guilty of both Counts 2 and 3, then the first element of Count 5 cannct be satisfied and you must find him not guilty of Count 5.

On the other hand, if you have found the defendant Rodriguez-Moreno guilty of either Count 2 or 3, then with reference to the second element you must determine beyond a reasonable doubt whether he used or carried a firearm during, or in relation to, the kidnap charged in that alleged count. If you find that he did not so use or carry a firearm, then you must find him not guilty of Count 5. If you find that he did so use or carry a firearm, then with reference to the third element you must determine beyond a reasonable doubt whether the defendant acted knowingly and willfully.

The term "firearm" includes any weapon which will or is designed to, or may readily be converted to expel a projectile by the action of an explosive. The United States must prove either the carrying or the use of the firearm. It need not do both.

To establish use of a firearm, it is not necessary [13.47] for the United States to establish that the weapon was fired, loaded, brandished or even handled. It is sufficient if the proof establishes that circumstances surrounding the kidnap-

pings suggest that the defendants—the defendant intended to have the firearm available for possible use during either of, or both of these offenses, or the circumstances surrounding the location where the firearm was present suggest that the firearm was strategically located so as to be quickly ready and readily available for use during and in relation to the kidnapping.

To establish carrying of a firearm, the United States need not show that the defendant actually carried the firearm on his person. It is sufficient if you find that the defendant transported or conveyed the weapon of had possession of it, in the sense that in a different given time in the course of any kidnapping you have found he had both the power and intention to exercise dominion or control of it.

I stress that if you find the defendant did use or carry a firearm, you must determine whether he did so knowingly and willfully, during and in relation to one of the offenses you have found he committed in Counts 2 or 3. It is sufficient if you find that the firearm was present for potential use to protect the defendant or to intimidate others during and in relation to that kidnapping.

[13.48] On the other hand, if you find that the presence of this firearm played no part in either of these offenses you have found, then you must find defendant Jacinto Rodriguez-Moreno not guilty of Count 5.

A few more brief instructions and I will be through. The question of punishment is not to enter into your deliberations, that is a function for the court. Your only concern is to determine guilt

or innocence. You make that determination by weighing the evidence, drawing the inferences which you find warranted, and finding the facts as to which you apply the law as I give it to you in these instructions. A consideration of the type or extent of any penalties that may or may not be imposed has no place in that process. You are not to be swayed or influenced or concerned in any way by the question of any punishment that may be imposed.

Now, with respect to your verdict, the verdict must represent the considered judgment of each juror. In order to return a verdict in this matter it is necessary that each juror agree thereto. You should go through each count separately, and as to each count your verdict must be unanimous, that is, your verdict on each count must be 12 to nothing as to whether you find each defendant named in that count guilty or not guilty.

Supreme Court, U.S.
FILED
AUG 7 1998
CLERK

No. 97-1139

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) is proper in any district in which the defendant committed the underlying crime of violence, even if the defendant did not use or carry the firearm in that district.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1139

UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 121 F.3d 841.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1997; an amended judgment was entered on September 3, 1997. See J.A. 2-4. A petition for rehearing was denied on September 26, 1997. Pet. App. 57a-58a. On December 16, 1997, Justice Souter extended the time in which to file a petition for a writ of certiorari to and including January 25, 1998. The petition for certiorari was filed on January 7, 1998, and was granted on June 8, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3, of the United States Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]

3. Section 3237(a) of Title 18, United States Code, provides as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

4. Rule 18, Federal Rules of Criminal Procedure, provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

5. Section 924(c)(1) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.] * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed run concurrently with any other term of imprisonment including that im-

posed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, six defendants, including respondent, were convicted on one count of conspiracy to kidnap Ephrain Avendano and his wife Marbel Avendano, in violation of 18 U.S.C. 1201(c), and one count of kidnapping Ephrain Avendano, in violation of 18 U.S.C. 1201(a)(1). Five of the defendants, including respondent, were also convicted on one count of kidnapping Marbel Avendano, in violation of 18 U.S.C. 1201(a)(1). Three of the defendants, but not respondent, were convicted on one count of conspiracy to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. Respondent was the only defendant convicted of using or carrying a firearm during and in relation to a crime of violence (the kidnapping of Ephrain Avendano), in violation of 18 U.S.C. 924(c)(1). See Pet. App. 2a.

1. This case arose out of a cocaine transaction between Omar Torres-Montalvo (Montalvo), a drug distributor operating out of Texas, and Fanol Ochoa, a New York drug dealer who made arrangements to purchase 30 kilograms of cocaine from Montalvo but absconded with the cocaine without paying for it. The transaction was arranged by Ephrain Avendano, acting as the middleman, who flew to Texas to help Ochoa make the arrangements with Montalvo. On December 11, 1994, Avendano and a colleague of Ochoa's, known as "Baldy," obtained 30 kilograms of cocaine from Montalvo and his colleague, Jorge Luis Pacheco. Baldy then drove away with the drugs,

presumably to give them to Ochoa. When Avendano paged Ochoa to secure payment for the drugs, Ochoa did not answer his pager. Pet. App. 3a-4a.

In response to Ochoa's failure to pay for the drugs, on December 12, 1994, Montalvo and Pacheco kidnapped Avendano and held him in various locations in Houston while they searched for Ochoa. Montalvo also hired defendant Jairo Pedroza-Ortiz, defendant Milton Palma-Ruedas, and respondent to look for Ochoa and to keep Avendano captive. After hearing that Ochoa had returned to New York, respondent, Pacheco, Montalvo, Ortiz, and Palma-Ruedas forcibly drove Avendano from Texas to Avendano's apartment in Middlesex, New Jersey. The defendants detained Avendano and his wife in their New Jersey apartment while they continued their search for Ochoa. Pet. App. 3a-5a.

On January 1, 1995, the kidnappers took Avendano to the house of defendant Randy Alvarez-Quinones in Newburgh, New York. After a police detective inquired about one of the cars at the Newburgh house, the kidnappers decided to drive Avendano to Maryland. Respondent, his five co-defendants, and Avendano arrived at a house in Maryland early on January 2, 1995. With the other defendants watching, respondent grabbed a .357 magnum revolver that was in the house, put it to Avendano's neck, and stated that he was ready to kill Avendano. Avendano eventually escaped from the house, ran to a neighbor's house a few blocks away, and called his wife in New Jersey. Mrs. Avendano contacted the police in New Jersey, and the neighbor called the police in Maryland. Pet. App. 6a-7a.

After obtaining a search warrant, Maryland police entered the house from which Avendano had escaped.

The police arrested respondent and his co-defendants and seized the .357 magnum, on which they found respondent's fingerprint. Pet. App. 7a.

2. The six defendants were tried jointly in the United States District Court for the District of New Jersey on charges of conspiring to distribute cocaine (J.A. 18), conspiring to kidnap Mr. and Mrs. Avendano (J.A. 12-16), kidnapping Mr. Avendano (J.A. 16), and kidnapping Mrs. Avendano (J.A. 17). Respondent was also initially charged in the same court with one count of violating 18 U.S.C. 924(c)(1), by using and carrying a firearm during and in relation to crimes of violence (the kidnappings of Mr. and Mrs. Avendano) and during and in relation to a drug trafficking crime (the drug conspiracy). J.A. 19.

At the conclusion of the government's case, the court dismissed the drug conspiracy charges against respondent, Palma-Ruedas, and Ortiz, pursuant to Federal Rule of Criminal Procedure 29(a). Pet. App. 7a-8a.[1] Respondent also moved to dismiss the Section 924(c)(1) charge against him for lack of venue in the District of New Jersey. Pet. App. 9a. The government acknowledged that the evidence at trial showed that respondent had used and carried the .357 magnum revolver only after the kidnappers arrived in Maryland. The government submitted, however, that venue for the Section 924(c) charge was proper in New Jersey, because respondent committed one of the elements of the offense, the crime of violence (*i.e.*, the

[1] The district court accepted the argument made by those defendants, but contested by the government, that persons who agree with drug sellers to assist in the collection of money owed for drugs that have already been distributed do not thereby join a drug distribution conspiracy. See Tr. 11.6-11.9 (C.A. App. 468-471).

kidnapping), in part in New Jersey. J.A. 46-47. The district court agreed, and denied the motion to dismiss the Section 924(c)(1) count. J.A. 54.

The jury found respondent guilty on one count of conspiracy to kidnap Mr. and Mrs. Avendano, one count of kidnapping Mr. Avendano, one count of kidnapping Mrs. Avendano, and one count of using or carrying a firearm during and in relation to the kidnapping of Mr. Avendano. Pet. App. 2a, 7a-8a.[2] Respondent was sentenced to 87 months' imprisonment on the three kidnapping counts and to a mandatory consecutive 60-month prison term on the Section 924(c) count. *Id.* at 8a n.2.

3. a. The court of appeals affirmed the convictions of all six defendants, except for respondent's Section 924(c)(1) conviction, which the panel reversed by a 2-1 vote. Pet. App. 1a-40a. The majority concluded that venue for the Section 924(c) count was not proper in New Jersey because respondent did not use or carry the firearm there, even though the predicate kidnapping charge that formed the "crime of violence" element of the Section 924(c) charge was committed in part in New Jersey. *Id.* at 9a-18a. The majority

[2] Because the court had dismissed the drug conspiracy charge against respondent, the Section 924(c) count went to the jury only on the theory that he had used or carried the firearm during and in relation to one of the kidnapping offenses, *i.e.*, the kidnapping of either Mr. or Mrs. Avendano. See J.A. 61. Because the evidence showed that respondent had used the gun in Maryland to threaten and restrain Mr. Avendano, and did not show that the firearm was used in New Jersey in the kidnapping of Mrs. Avendano, the jury's verdict rests on respondent's use of the firearm in relation to the kidnapping of Mr. Avendano. See *Griffin* v. *United States*, 502 U.S. 46, 59-60 (1991).

aligned itself with a decision of the Ninth Circuit, *United States* v. *Corona*, 34 F.3d 876 (1994), that had adopted a "key verb" or "active verb" test, that "examines the verbs in the statute that define the criminal conduct to determine where the offense was committed." Pet. App. 12a, 14a. The court rejected (*id.* at 15a) the "more pragmatic approach" of the Fifth Circuit in *United States* v. *Pomranz*, 43 F.3d 156, cert. denied, 516 U.S. 986 (1995), which had reasoned that "a violation of § 924(c)(1) is necessarily intertwined with the predicate act of drug trafficking or committing a violent crime." Pet. App. 12a-13a.

Under the "verb test," the majority stated,

> [Section] 924(c)(1) unambiguously designates the criminal conduct that is prohibited as "using" or "carrying" a firearm. It follows that one "commits" a violation of § 924(c)(1) in the district where one "uses" or "carries" a firearm. Accordingly, we conclude that because the crime committed by [respondent]—*carrying* or *using* a firearm in relation to a crime of violence—occurred only in Maryland, [respondent] could only have been properly tried in Maryland.

Id. at 15a. The court acknowledged that "Congress could have drafted [Section 924(c)(1)] to allow venue to lie in any district where the government could properly bring the related crime of violence or drug trafficking offense," but it concluded that the language actually chosen by Congress did not accomplish that result. *Id.* at 18a.

b. Judge Alito dissented from the reversal of respondent's Section 924(c)(1) conviction. Pet. App. 40a-56a. Following this Court's guidance that venue is dependent on "a realistic appraisal of the 'nature of

the crime' defined by the statute," *id.* at 41a (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)), he concluded "that the commission of the crime of violence or drug trafficking crime is a critical element of the [Section 924(c)(1)] offense and that permitting venue in a district in which the commission of this underlying crime occurred is consistent with the Constitution's venue provisions." *Ibid.*

Judge Alito observed that "while the 'verb test' may provide a useful first cut at determining venue," this Court "has never embraced the 'verb test,'" and "there are complicated crimes for which a rigid grammar-based test may not be appropriate." Pet. App. 48a. In the case of Section 924(c)(1), for example, "the defendant's commission of the underlying crime of violence or drug trafficking offense forms a vital part of the evil that Congress sought to punish and prevent." *Id.* at 49a. Indeed, "a central focus, if not *the* central focus, of the statute is the commission of the underlying crime." *Id.* at 49a-50a. Judge Alito therefore would have held that venue on the Section 924(c) charge was proper in the District of New Jersey because the crime of violence was committed there, and he would have affirmed respondent's Section 924(c)(1) conviction. *Id.* at 56a.

4. The government filed a petition for rehearing with a suggestion for rehearing en banc addressed solely to the venue question. On September 26, 1997, the Third Circuit voted 6-6 to deny that petition. Pet. App. 57a-58a.

SUMMARY OF ARGUMENT

Under the Constitution's venue provisions, a criminal defendant shall be tried in the State and district in which the offense "shall have been committed." It has long been recognized that a crime is "committed" in every district in which any *actus reus* element of the crime is carried out. Therefore, prosecution for a crime may be brought in a district in which an *actus reus* element of the crime was carried out by the defendant, even if other acts constituting elements of the crime were carried out in other districts. "Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916).

Application of these principles to 18 U.S.C. 924(c)(1) leads to the conclusion that a defendant may be prosecuted for using or carrying a firearm during and in relation to a crime of violence in a district where the predicate crime of violence occurred, even if the gun was used or carried only in a different district. Section 924(c)(1) has two essential elements requiring proof of acts by the defendant (or acts for which he may be held accountable): (1) the commission of a federal crime of violence or drug trafficking crime, and (2) the defendant's use or carrying of a gun during and in relation to that crime. Because respondent's commission of a crime of violence was an *actus reus* element of the Section 924(c) charge against him, venue for this prosecution was proper in the District of New Jersey, where his crime of violence, kidnapping, was in part carried out.

The court of appeals erroneously concluded that venue was proper only in Maryland because that is

where respondent "used" or "carried" a firearm. The court found it controlling that the active verbs in Section 924(c) are "use" and "carry," and it therefore concluded that venue must lie only where the gun is "used" or "carried." This Court has never approved such a "verb test," however, and the test is inadequate for cases in which the statutory charge has multiple *actus reus* elements. Moreover, minor alterations in phrasing that would not change the substance of Section 924(c) would lead to a different result under the verb test. Rather than a rigid verb test, venue should turn on the actual nature of the crime and the "location of the act or acts constituting it." *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). In this case, those acts include both use of a gun and commission of another crime, and venue is proper not only where the use of the gun took place but also where the predicate crime took place.

The Court's recent decision in *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), does not support the holding of the court of appeals. *Cabrales* held that venue for a prosecution for money laundering lies where the prohibited financial transactions took place, not where the crimes that generated the tainted money were committed. *Cabrales* emphasized that the acts constituting the defendant's money laundering included only the financial transactions at issue; she need not have committed, aided and abetted, or conspired to commit the underlying crimes that were the source of the laundered funds. A prosecution under Section 924(c)(1), by contrast, requires proof that the defendant committed, aided and abetted, or conspired to commit the predicate "crime of violence," during and in relation to which the gun was

used or carried; venue is therefore proper anywhere the defendant committed that crime of violence.

A rule permitting prosecution of Section 924(c) offenses wherever the predicate crimes of violence are committed is compatible with the interests of the defendant underlying the venue requirement. Consistent with Congress's intent that punishment for a Section 924(c) violation be in addition to punishment for the underlying predicate offense, the government typically joins a Section 924(c) charge with a separate charge for the underlying predicate violation. If the government were required to try the two offenses separately in different districts, the defendant would have to marshal the same evidence twice to defend himself in separate trials in different districts. If the government were forced to bring both cases only where the gun was "used," it would be difficult to bring an efficient prosecution in many multiple-object conspiracy cases where the object crimes are carried out in several states but a gun happens to be used only in one, and the place of trial may be distant from the main sources of evidence of the criminal conduct. The alternative of dropping the Section 924(c) offense would undermine Congress's intent that crimes of violence accompanied by use or carrying of firearms be subject to a mandatory five-year prison term.

ARGUMENT

VENUE FOR RESPONDENT'S OFFENSE OF USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE WAS PROPER IN NEW JERSEY, EVEN THOUGH THE FIREARM WAS USED IN MARYLAND, BECAUSE THE CRIME OF VIOLENCE WAS COMMITTED IN PART IN NEW JERSEY

The question presented in this case is whether a defendant charged under 18 U.S.C. 924(c) with "us[ing] or carry[ing] a firearm" "during and in relation to a crime of violence" may be prosecuted in a district in which the "crime of violence" was committed, when the use of the firearm occurred elsewhere. The answer is supplied by the well-established rule that venue is proper for an offense in a district where the defendant commits (or is legally responsible for) an *actus reus* element of the offense, even if some other acts took place elsewhere. Accordingly, because the offense defined by Section 924(c) is "committed" in a district where the crime of violence takes place, venue for prosecution of a violation of Section 924(c) is proper where the crime of violence occurred, even if the gun was used or carried in a different district.

A. An Offense May Be Prosecuted In Any District In Which An *Actus Reus* Element Of The Offense Was Carried Out

The Constitution provides that a criminal defendant shall be tried in the State and district in which the offense "shall have been committed." U.S. Const. Art. III, § 2, Cl. 3; Amend. VI; see also Fed. R. Crim. P. 18 ("the prosecution shall be had in a district in

which the offense was committed").[3] Although, under the common law, a criminal offense was deemed to have only a single situs at which a prosecution might be brought, it has long been recognized that the Constitution does not mandate such a restrictive approach. As early as 1867, Congress provided that, in cases involving a criminal offense "begun in one judicial district of the United States and completed in another," the prosecution for such an offense might be brought "in either of the said districts, in the same manner as if it had been actually and wholly committed therein." Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484. Today that rule is embodied in 18 U.S.C. 3237(a), which permits prosecution in any district where an "offense was begun, continued, or completed."

This Court has likewise recognized that, where a criminal offense spans more than one district, the offense may be tried in any district in which an *actus reus* element of that offense was committed. As this Court has stated, "[u]ndoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916). Indeed, this court has held venue proper in a variety of circumstances despite the absence of evidence that the defendant personally undertook any action, or indeed was ever physically

[3] "Strictly speaking, [Article III, § 2, Cl. 3] is a venue provision, since it fixes the place of trial, while the [Sixth Amendment] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no importance." 2 C. Wright, *Federal Practice and Procedure* § 301, at 190 (2d ed. 1982) (footnotes omitted).

present, in the district in which the prosecution was brought.

It is clear, for example, that a federal crime may be "committed," for purposes of constitutional and statutory venue provisions, in any district in which acts constituting an element of the offense for which the defendant is accountable are carried out, even if performed by someone other than the defendant. In *Hyde* v. *United States*, 225 U.S. 347 (1912), the defendants were convicted of conspiracy to defraud the United States out of public lands located in Oregon and California. See *id.* at 349-351. The prosecution was brought in the District of Columbia, based on a co-conspirator's performance in that district of overt acts in furtherance of the conspiracy. Although it was not alleged either that the defendants had entered the District of Columbia or that the conspiracy had been formed there, the Court held that venue in that district was proper, based on the performance of overt acts there by the defendants' co-conspirator. *Id.* at 356-367.

The courts of appeals have also uniformly concluded that venue in a conspiracy prosecution brought under 18 U.S.C. 371 is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the conspirators.[4] Indeed, they have held that venue in conspiracy cases is proper wherever an overt act was carried out, even if proof of

[4] See, *e.g.*, *United States* v. *Bascope-Zurita*, 68 F.3d 1057, 1062 (8th Cir. 1995), cert. denied, 516 U.S. 1062 (1996); *United States* v. *Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990); *United States* v. *Uribe*, 890 F.2d 554, 558 (1st Cir. 1989); *United States* v. *Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988).

an overt act is not necessary to a conviction.[5] The courts have similarly held that one accused under 18 U.S.C. 2(a) of aiding or abetting the commission of a substantive crime may be prosecuted not only where the defendant committed his acts, but also where the principal committed the substantive crime.[6] Thus, when a defendant's criminal acts are performed in concert with other wrongdoers, the defendant is subject to prosecution in the districts where his confederates' criminal conduct was carried out, whether or not he was present in that district.

Venue may also be based on the effects of a defendant's conduct in another district. An offense involving the use of the mails, for example, may constitutionally be prosecuted "in any district from, through, or into which" the materials passed in transit, even if the defendant never possessed the materials in each such district. 18 U.S.C. 3237(a); see

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[5] *United States* v. *Mayo*, 721 F.2d 1084, 1088-1091 (7th Cir. 1983); *Kott* v. *United States*, 163 F.2d 984, 986 (5th Cir. 1947), cert. denied, 333 U.S. 837 (1948); see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927) (apparently endorsing this view).

[6] *United States* v. *Romero*, No. 97-2983, 1998 WL 407103, at *6 (8th Cir. July 22, 1998); accord *United States* v. *Mendoza*, 108 F.3d 1155, 1156 (9th Cir.), cert. denied, 118 S. Ct. 351 (1997); *United States* v. *Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States* v. *Brantley*, 733 F.2d 1429, 1434 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Kibler*, 667 F.2d 452, 455 (4th Cir.), cert. denied, 456 U.S. 961 (1982); *United States* v. *Gillette*, 189 F.2d 449, 451-452 (2d Cir.), cert. denied, 342 U.S. 827 (1951); see also *United States* v. *Chestnut*, 553 F.2d 40, 47 (2d Cir. 1976) (prosecution for causing another to accept and receive illegal campaign contributions may be brought where contribution was received, as well as made).

In re Palliser, 136 U.S. 257, 266 (1890) (holding, under predecessor version of general venue statute, that an offense committed through the use of the mails could be prosecuted in the district where the letter is received); *United States* v. *Johnson*, 323 U.S. 273, 275 (1944) (consistent with the Constitution, "an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district"). A prosecution for illegally accepting transportation of goods from a common carrier at rates less than the carrier's published rates may be brought in any district through which the goods were transported, even if the defendant's only interaction with the carrier was entering into an agreement, in a district other than the one in which the prosecution is brought. See *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73-77 (1908). Similarly, the lower courts have held that a prosecution for obstruction of justice may constitutionally be brought in the district where the obstructed judicial proceedings occurred, even if the defendant's obstructive acts took place at another location.[7] And prosecutions under the Hobbs Act for

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[7] See, *e.g.*, *United States* v. *Cofield*, 11 F.3d 413, 415-419 (4th Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *United States* v. *Frederick*, 835 F.2d 1211, 1212-1215 (7th Cir. 1987), cert. denied, 486 U.S. 1013 (1988); *United States* v. *Reed*, 773 F.2d 477, 484-486 (2d Cir. 1985); *United States* v. *Barham*, 666 F.2d 521, 523-524 (11th Cir.), cert. denied, 456 U.S. 947 (1982); *United States* v. *Tedesco*, 635 F.2d 902, 904-906 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981). But see *United States* v. *White*, 887 F.2d 267, 272 & n.3 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (holding that, under prior circuit precedent, prosecution for bribery or obstruction of justice can be brought only in the

obstructing, delaying, or affecting interstate commerce by means of robbery or extortion, 18 U.S.C. 1951(a), may be brought in the district where the requisite effect on interstate commerce was felt, as well as in the district where the robbery or extortion took place.[8]

B. Venue In A Prosecution Under 18 U.S.C. 924(c)(1) Is Proper Where The Predicate Crime Took Place, Because That Crime Is One Of The Acts Constituting The Offense

Because venue for prosecution of a federal crime is proper in any district in which an element of the offense for which the defendant is accountable was "committed," even if not committed by the defendant personally in that district, it is *a fortiori* proper in any district in which acts constituting an element of a multiple-element offense were committed by the defendant in that district. That proposition leads to the conclusion that venue in this case was proper in the District of New Jersey, for, as we now explain, respondent committed one of the elements of his Section 924(c) offense—the commission of a federal crime of violence—in New Jersey.

1. To decide where venue is permissible for a prosecution under 18 U.S.C. 924(c), it is necessary to determine the elements of that offense. This Court "adheres to the general guide" that "'the *locus delicti*

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district where the bribe or obstructive act took place). In 1988, Congress specifically provided that venue is proper in the district where the proceeding that was the object of the obstruction took place. 18 U.S.C. 1512(h); see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a), 102 Stat. 4397-4398.

[8] See *United States* v. *Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990); *United States* v. *Lewis*, 797 F.2d 358, 367 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987).

must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States* v. *Cabrales*, 118 S. Ct. 1772, 1776 (1998) (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)) (brackets omitted); see *Travis* v. *United States*, 364 U.S. 631, 635 (1961); *United States* v. *Cores*, 356 U.S. 405, 408 (1958). The "acts constituting" a violation of Section 924(c)(1) are two: the defendant must use or carry a firearm, and he must commit a crime of violence (or a drug trafficking crime), during and in relation to which the gun was used or carried. "The mere carrying or use of a firearm is not the criminal *actus reus* proscribed"; instead, the offense requires "that a criminal defendant used a firearm in committing another federal crime." *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993). The firearm's use is "inextricably intertwined with the underlying offense." *Id.* at 1084. Moreover, "the gun at least must facilitate, or have the potential of facilitating, the [underlying] offense," *Smith* v. *United States*, 508 U.S. 223, 238 (1993) (internal brackets and quotation marks omitted), for "[t]he relation between the firearm and the underlying offense is an essential element of the crime." *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), cert. denied, 484 U.S. 867 (1987).

Thus, Section 924(c) defines an offense that has "distinct parts"—the use of the gun and the commission of the crime of violence—and may be prosecuted in any district where either of those parts "can be proved to have been done." *Lombardo*, 241 U.S. at 77. In the present case, respondent and his co-defendants were prosecuted and convicted in the District of New Jersey for a federal crime of violence (kidnapping

Mr. Avendano), during and in relation to which respondent used a gun in Maryland. Respondent does not contend that venue in New Jersey was improper on the kidnapping charge. Nor does respondent contend that the kidnapping does not satisfy the "crime of violence" element of the Section 924(c) count, or that he did not use or carry a firearm "during and in relation to" the kidnapping offense. Indeed, the court of appeals acknowledged that respondent's use of the revolver in Maryland was "related to the kidnapping of Mr. Avendano." Pet. App. 15a n.5 (emphasis omitted). Because the act of kidnapping occurred in part in New Jersey, venue for the Section 924(c) properly lay in the District of New Jersey.

The offense defined by Section 924(c) is similar, in pertinent respects, to other complex federal crimes with multiple *actus reus* elements, one of which is the commission of (or attempt to commit) another crime. In those situations, the courts have held that venue is proper in any district in which any of the *actus reus* elements was performed, including the predicate or underlying crime. For example, to prove a substantive violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, the government must show "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas* v. *United States*, 118 S. Ct. 469, 476 (1997); see 18 U.S.C. 1962(c). A RICO prosecution may be brought in any district where the racketeering activity has taken place, whether or not the defendant personally undertook any action there. See *United States* v. *Persico*, 621 F. Supp. 842, 858 (S.D.N.Y. 1985). Similarly, the continuing criminal enterprise statute, 21 U.S.C. 848, requires proof of a continuing series of violations of federal narcotics law,

undertaken by an organizer, supervisor, or manager in concert with five or more persons, from which the defendant obtains substantial income. 21 U.S.C. 848(c). "It is enough, to confer venue on a district, that one of the 'continuing series' of criminal acts constituting the enterprise occur there," even if the defendant never physically entered that district or actively organized, supervised, or managed anything there. *United States* v. *Fry*, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). And a prosecution under the Travel Act, 18 U.S.C. 1952, which prohibits traveling in interstate commerce with the intent to promote unlawful activity, and thereafter committing or attempting to commit such unlawful activity, may be brought in any district where the travel occurred, including the district from which the travel commenced and the district in which the unlawful activity was promoted or carried out. See *United States* v. *Burns*, 990 F.2d 1426, 1436-1437 (4th Cir.), cert. denied, 508 U.S. 967 (1993); *United States* v. *Blitstein*, 626 F.2d 774, 783-784 (10th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); *United States* v. *Polizzi*, 500 F.2d 856, 899 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

2. It is particularly appropriate for violations of Section 924(c)(1) to be prosecuted wherever the incorporated crime of violence may be prosecuted, for Congress's intent in enacting Section 924(c)(1) was not to punish the use or carrying of a gun *per se*, but rather to prevent other federal offenses from becoming more dangerous through the use of firearms. And while Section 924(c)(1) is undoubtedly an independent offense, and not merely a sentence-enhancement provision, its purpose and effect are to provide a

mandatory imprisonment term for other federal offenses made more dangerous through the use or carrying of firearms, in addition to any punishment imposed for those offenses themelves. Indeed, Section 924(c)(1) charges are almost always brought in tandem with other charges (usually several others), and are almost never brought alone.[9]

The legislative development of Section 924(c) shows that Congress intended the penalty imposed by that Section to provide a stricter punishment for other federal offenses made more dangerous through the use or carrying of firearms. The original version of Section 924(c) was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223-1224. The predecessor to what took shape as Section 924(c) was introduced as an amendment to pending gun control legislation on the floor of the House of Representatives by Representative Poff, who stated that the purpose of the mandatory minimum sentence effected by his amendment was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968); see *Muscarello* v. *United States*, 118 S. Ct. 1911, 1916 (1998) (noting that Court had found those comments by Rep. Poff to be "crucial material" in interpreting Section 924(c)); *Busic* v. *United States*, 446 U.S. 398, 405 (1980) (similar); *Simpson* v. *United States*, 435 U.S. 6,

[9] Records compiled by the Bureau of Justice Statistics indicate that, in Fiscal Year 1997, the government charged 2136 defendants with violating 18 U.S.C. 924(c). Only 20 defendants, or fewer than 1% of the total, were charged solely under that statute. Of the remaining 1936 defendants, 546 were charged with one other offense, 588 were charged with two other offenses, 341 were charged with three other offenses, and 641 were charged with four or more other offenses.

13-14 (1978) (similar). Representative Poff suggested that his amendment was superior to an amendment proposed by Representative Casey because the Casey amendment would have reached the use of guns in state offenses, if the gun had moved in interstate commerce. Representative Poff opposed the Casey proposal because of its potential for increased burdens on the federal courts, and in response to a colloquy about prosecutions under his amendment, he stated that an advantage of his proposal was that "it would be expected that the prosecution for the basic felony and the prosecution under my subsection would constitute one proceeding out of which two separate penalties may grow." 114 Cong. Rec. at 22,232.

Section 924(c) was revised as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 99-473, ch. X, pt. D, § 1005, 98 Stat. 2138-2139. The 1984 revisions restricted the scope of Section 924(c) to firearm use or carrying "during and in relation to" federal crimes of violence (rather than all federal felonies, as was the case before 1984), and overturned the effect of the decisions of this Court restricting the use of Section 924(c) in prosecutions in which the defendant was also charged with a federal offense containing its own sentence-enhancement provision. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983) (discussing *Simpson*, *supra*, and *Busic*, *supra*). As before, however, "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of [another federal] felony." *Stewart*, 779 F.2d at 540.

Section 924(c) was revised again in 1986, when Congress extended it to reach using or carrying firearms during and in relation to drug trafficking

crimes, as well as crimes of violence. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 456-457. That amendment, reflecting Congress's concern about the "dangerous combination of drugs and guns," *Muscarello*, 118 S. Ct. at 1916 (internal quotation marks omitted), added new penalties for drug violations involving use or carrying of firearms.

This legislative background underscores that the offense stated in Section 924(c) is not merely the "use" or "carry[ing]" of a firearm. The commission of a "crime of violence" or "drug trafficking crime" by the defendant (or for which the defendant is legally accountable) is equally an essential element of the offense. As such, venue for prosecutions under Section 924(c) is governed by the familiar and well-established rule that an offense is "committed," and therefore a prosecution may be brought, in any district in which any *actus reus* element of the offense was carried out—including the element of the commission of a federal crime of violence.

C. The Court Of Appeals' "Key Verb" Test Should Be Rejected In This Case

Although the court of appeals did not disagree with the government's point that "a violation of § 924(c)(1) is dependent on the predicate offense," which was committed in both New Jersey and Maryland (Pet. App. 14a), it nonetheless concluded that venue would be proper in this case only in Maryland because it was there that respondent "used" his firearm (*id.* at 15a). It reached that conclusion by applying a "key verb" or "active verb" test. Under that test, the crime is deemed to have been "committed" where the conduct described by the active verb in the offense-defining provision took place. *Id.* at 14a-15a. In this case, the

court reasoned that, because the verbs defining the prohibited conduct under Section 924(c)(1) are "uses" and "carries," courts should look only to the place where the firearm was "used" or "carried" to determine the proper venue. *Id.* at 15a.

This Court has never adopted or applied such a "key verb" test that focuses solely on one part of speech in a statutory sentence. Rather, the Court has consistently applied a more realistic approach to the offense in question, emphasizing the "nature of the crime alleged and the location of the act or acts constituting it." *E.g.*, *Cabrales*, 118 S. Ct. at 1776. And whatever might be the merits of the "key verb" test in other, simpler contexts, it is inadequate in cases like this one, involving an offense with more than one *actus reus* element. As Professor Abrams suggested, identification of the key verb cannot be dispositive of "the proper venue of an offense with multi-district contacts," and one must draw a distinction between "two general types" of crimes, "those involving an offense interpreted to consist of at least two separate act-elements; and those involving one treated by the courts as composed of a single act-element." N. Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751, 777 (1962).

Contrary to the court of appeals' assertion (Pet. App. 15a), Section 924(c)(1) does *not* "designate[] the criminal conduct that is prohibited as 'using' or 'carrying' a firearm." Rather, the conduct prohibited by Section 924(c)(1) is using or carrying a firearm during and in relation to another crime also committed by that defendant. The defendant must commit another federal crime (here, a crime of violence) *and* use or carry a gun in relation to that crime. Thus,

Section 924(c)(1) incorporates all of the elements of the "crime of violence" or the "drug trafficking crime," and the government is required to prove that the defendant committed all those elements.[10]

Rather that rest on the actual nature of the crime, the court of appeals' verb test would make the venue for the prosecution dependent on immaterial aspects of the statutory language. As Judge Alito pointed out (Pet. App. 43a-44a) and the majority acknowledged (*id.* at 18a), Congress might have used minimally different statutory language to describe the crime stated in Section 924(c)(1) and employed active verbs rather than prepositional phrases to describe the predicate-crime element. Thus, Congress might have rephrased the offense in Section 924(c) to punish anyone who "commits a federal crime of violence and uses or carries a firearm during and in relation to that crime." Had Congress used such language, those insignificant differences, under the majority's test, would have led to a different outcome in this case. Yet there is little sense in a venue test that depends on nothing of substance in the offense defined by the criminal statute.

Moreover, an "active verb" test would do little to resolve questions of venue for offenses that are defined through subordinate clauses or past participles combined with infinitive phrases, see Pet. App. 53a-55a (Judge Alito's dissent, discussing 18 U.S.C. 922(g)), or offenses that punish one who "fails" or "refuses" to perform some duty. In *Johnston* v. *United States*, 351 U.S. 215 (1956), for example, the government prosecuted several conscientious objectors who had refused to report for their assignments for civilian work in lieu of military induction. The applicable statute punished anyone who "knowingly fail[ed] or neglect[ed] or refuse[d] to perform any duty required of him under or in execution of this title [involving the military draft]." *Id.* at 221. Over the objection of the dissent that "when the registrant is adamant in his refusal to budge from his home town and stays at home defying the local authorities, the crime he has committed has been committed at home," *id.* at 223 (Douglas, J., dissenting), the Court concluded that the crime was committed where the duty "to report" was to have been performed, for that was "where the failure occurred," *id.* at 222-223. The Court did not give controlling weight to the active verbs in the statute—"fail or neglect or refuse"—but rather examined the entire statute, including the infinitive phrase "to perform any duty," to determine the nature of the offense and its locus. So too here, a single-minded focus on the active verbs "use" and "carry" does not capture the essence of Section 924(c)(1) and is therefore an inaccurate method to determine where the crime was committed.[11]

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[10] In establishing those elements, the usual means for showing a defendant's liability, such as abetting and abetting and liability under the *Pinkerton* doctrine of conspiracy law, may be invoked. See, *e.g.*, *Bazemore* v. *United States*, 138 F.3d 947, 949 (11th Cir. 1998); *Woodruff* v. *United States*, 131 F.3d 1238, 1243 (7th Cir. 1997).

[11] It is also difficult to square the "key verb" test with decisions holding that venue for conspiracy prosecutions is proper wherever an overt act in furtherance of the conspiracy is carried out, even if the agreement was not formed in the district of prosecution. See pp. 15-16, *supra*. Because, as the courts have held, such venue is proper even when proof of an overt act is not necessary for proof of the conspiracy (*ibid.*), it would be difficult to rationalize those cases on the basis that the defendants had undertaken the action defined by the "key

D. This Court's Decision In *United States* v. *Cabrales* Does Not Suggest That The Only Proper Venue For A Section 924(c)(1) Offense Is Where The "Use" Or "Carrying" Occurred

In *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), this Court held that venue for a charge of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 18 U.S.C. 1957, was not proper in the district where the laundered proceeds were unlawfully generated, when the prohibited financial transactions occurred in another district. *Id.* at 1775-1777. The Court observed that the crimes described by the money laundering statutes "interdict only the financial transactions [and] * * * not the anterior criminal conduct that yielded the funds allegedly laundered." *Id.* at 1776. Thus, the Court ruled that the charged offenses, *i.e.*, conducting financial transactions to avoid a reporting requirement (§ 1956) and in criminally derived property (§ 1957), were committed "wholly within Florida," where the transactions occurred. *Ibid.*

The analysis in *Cabrales* depended on the fact that the money laundering statutes at issue there did not require the defendant's involvement in or accountability for the unlawful activity that generated the laundered funds. As the Court explained, the defendant in *Cabrales* was "charged in the money-laundering counts with criminal activity 'after the fact' of an offense begun and completed by others." 118 S. Ct. at 1776. Respondent, however, was not charged with a crime that occurred "after the fact" of another person's offense. To the contrary, the charged violation of Section 924(c)(1) required proof that respondent used or carried a firearm during and in relation to another crime that he committed. While Cabrales' money laundering offenses did not require proof that she was in any way involved with the unlawful activity that generated the laundered funds, respondent's offense required proof that he had kidnapped Mr. Avendano, and used a firearm during and in relation to that kidnapping. Thus, respondent, unlike Cabrales, committed acts constituting an element of the offense in the district in which he was tried. As we have explained, committing a crime of violence in relation to the use of a firearm is an essential element of a Section 924(c)(1) offense, and respondent committed such a crime of violence in New Jersey.

Moreover, in *Cabrales*, the substantive money laundering offense, as charged in the indictment, alleged no factual link between the defendant and the Western District of Missouri, the district of indictment and trial. See 118 S. Ct. at 1777 ("The counts before us portray [Cabrales] and the money she deposited and withdrew as moving inside Florida only."). Here, in contrast, the count of the indictment charging a violation of Section 924(c) unmistakably linked respondent with the District of New Jersey. J.A. 15-16, 19-20. Respondent was an integral participant in the kidnapping of Mr. Avendano; he helped to hold him hostage in Texas, he transported him to New

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verb" in the statute—"to conspire"—in the district of prosecution. It is possible to resort to the "fictional theory that each [overt] act 'renews' the conspiracy wherever it occurs," Abrams, *supra*, 9 UCLA L. Rev. at 763, and thus to conclude that the conspirators all "conspire" anew whenever any of them commits an over act. The more realistic analysis, however, is that venue in a conspiracy case is proper where an overt act is performed because a conspiracy has effects, and therefore may be prosecuted, wherever acts in furtherance of it are carried out.

Jersey, and he subsequently moved him to New York and Maryland. He therefore was alleged and shown to have committed the predicate crime of kidnapping in part in the district of trial. The holding of *Cabrales* therefore has no application here, where respondent himself committed the predicate crime and is factually linked in that action to the district in which he was tried.

E. Prosecution Of Respondent's Section 924(c) Offense In New Jersey Is Consistent With The Purposes Of The Constitutional And Statutory Venue Provisions

A rule requiring prosecution of violations of Section 924(c)(1) only in the district in which the gun was actually "used" or "carried," and not also permitting such prosecutions in a district in which the crime of violence was committed, would do little to advance defendants' interests secured by the constitutional and statutory venue prosecutions. At the same time, it would undercut the effective administration of the criminal law.

If the government could not prosecute respondent in New Jersey for both kidnapping Mr. Avendano and using a gun during that kidnapping, there would be three other potential avenues of prosecution available to it. First, the government could prosecute the kidnapping offense in New Jersey and prosecute the Section 924(c) offense in Maryland. That approach, however, would do little to benefit respondent. Because the government is required to show that respondent committed the underlying kidnapping offense in order to prove that he used a gun "during and in relation to" that offense, the government would, in effect, be required to prove the kidnapping offense twice. Respondent would also be required to

marshal the same evidence twice in defense to the charges. Two prosecutions involving the same evidence would hardly benefit the defendant, and such sequential prosecutions would also burden the judicial system.

Second, the government could prosecute both the kidnapping offense and the Section 924(c) offense in Maryland. That approach would also entail considerable costs, for both respondent and the government. It would require the government to bring, and respondent to defend, a prosecution for the kidnapping of Mr. Avendano separately from a prosecution for the kidnapping of Mrs. Avendano, even though both kidnappings were committed by the same defendants during overlapping time periods and after the same botched drug transaction, and both were charged as overt acts committed in furtherance of the same conspiracy (which encompassed both kidnappings). See J.A. 13-16. It would also shift much of the weight of the case away from New Jersey—a result that conflicts with the purpose of the venue requirement to try cases where crimes are committed and evidence is likely to be (here, New Jersey, where the two kidnappings mostly took place and the victims resided), and with another of its purposes, to protect "a community's right to have trials of local offenses occur in the community." Pet. App. 47a (Alito, J., dissenting); A. Amar, *The Constitution and Criminal Procedure—First Principles* 124 (1997).

To avoid those problems, the government could, as a third alternative, pursue the kidnapping offenses in New Jersey and drop the Section 924(c) prosecution altogether. That alternative, however, is inconsistent with Congress's clearly expressed intent that federal crimes of violence accompanied by the use of a

firearm be punished in addition to the punishment for the underlying offense and be subject to the mandatory five-year prison term imposed by Section 924(c)(1). As we have explained (p. 23, *supra*), Congress amended Section 924(c) in 1984 to overturn the effect of this Court's decisions in *Simpson* and *Busic* and to make plain that all such crimes of violence should be punished by an additional, mandatory prison term, consecutive to any sentence imposed for the underlying offense. While the Sentencing Guidelines do provide for an offender's offense level to be increased by two levels based on his use of a dangerous weapon (including a firearm) during a kidnapping (see Guidelines § 2A4.1(b)(3); cf. Guidelines § 2D1.1(b)(1) (drug trafficking offenses)), the effect of that increase does not nearly match the additional five-year prison term required by Section 924(c)(1).[12] The significant difference in sentencing also distinguishes this case from *Cabrales*, where there was likely to be a "negligible" effect on sentencing from abandoning the money laundering

[12] For example, an offender in criminal history category I who was convicted of kidnapping and whose offense involved no increases in offense levels or adjustments would be sentenced to 51-63 months' imprisonment. See Guidelines § 2A4.1(a) (offense level 24), Ch. 5, Pt. A (sentencing table). If the same offender used a firearm during the kidnapping, his offense level would be increased to 26, and his sentence would be 63-78 months' imprisonment. *Ibid.* If he were prosecuted under Section 924(c) as well, his effective Guidelines range would be 111-123 months' imprisonment (51-63 months, plus 5-year mandatory term). Currently, when a defendant is sentenced under Section 924(c)(1), his offense level for the underlying crime of violence or drug trafficking offense is not also increased for use of the firearm. See Guidelines § 2K2.4, Application Note 2.

charge in Florida. 117 S. Ct. at 1777. The difference would not be negligible here, and nothing in the Constitution's venue provisions justifies such a windfall for the defendant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

JACINTO RODRIGUEZ-MORENO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT JACINTO RODRIGUEZ-MORENO

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QUESTION PRESENTED

Whether venue in a prosecution under 18 U.S.C. § 924(c)(1) is proper in a district where the defendant neither used nor carried a firearm?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1139

UNITED STATES OF AMERICA,
Petitioner,

v.

JACINTO RODRIGUEZ-MORENO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT JACINTO RODRIGUEZ-MORENO

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 121 F. 3d 841.

JURISDICTION

Respondent is satisfied with and generally adopts the government's statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3 of the United States Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendmeent to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. Section 924(c)(1) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.]

4. Section 3237(a) of Title 18, United States Code, provides in pertinent part as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

5. Rule 18, Federal Rules of Criminal Procedure, provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

STATEMENT OF THE CASE

Respondent was convicted of kidnapping Ephrain Avendano and using a firearm during the commission of that kidnapping.[1] Pet. App. 2a. Mr. Avendano was the middle man in a large scale cocaine transaction that fell apart when Mr. Avendano's cohort "Baldy" absconded with the unpaid for drugs. Baldy left Avendano in Texas to deal with the sellers, defendants Torres-Montalvo and Pacheco. Pet. App. 3a-4a.

Respondent was originally charged with the cocaine conspiracy but the trial judge dismissed that charge against him at the end of the government's case in chief. The trial judge found that respondent's assistance in helping to locate the purchasers of the drugs did not make him a conspirator in the drug transaction which had been completed well in advance of respondent's involvement. Pet. App. 7a-8a.

After an unsuccessful search for the purchasers of the cocaine in Texas, New Jersey and New York, the defendants and Mr. Avendano arrived in Maryland. There, respondent threatened Mr. Avendano with a handgun not previously carried or used, a Dan Wesson, Model CTG

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[1] Respondent and his five codefendants were convicted of other crimes involved in this incident and those convictions are not implicated in this appeal.

.357 magnum.[2] Pet. App. 6a. That weapon appeared for the first time while the defendants and Mr. Avendano were staying in Maryland. It is undisputed that the weapon was never used or carried in the State of New Jersey. Pet. App. 9a.

Respondent alone was charged with violating 18 U.S.C. § 924(c)(1). Indictment 95-70 charges, in pertinent part:

COUNT FIVE

2. From on or about December 12, 1994 through on or about January 2, 1995, at Middlesex County, in the District of New Jersey, and elsewhere, defendant

JACINTO RODRIGUEZ-MORENO[3]

did knowingly and willfully use and carry a firearm, namely a Dan Wesson, Model CTG .357 magnum, serial number 357S003434, during and in relation to crimes of violence, namely the unlawful kidnapping of Ephrain Avendano as charged in Count Two, and the unlawful kidnapping of Marbel Avendano as charged in Count Three, and a drug trafficking crime, namely, the unlawful conspiracy to distribute and possess with intent to distribute approximately 30 kilograms of cocaine, as charged in Count Four.

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[2] Mr. Avendano eventually escaped from the defendants and went to a local police station in Maryland where he gave a detailed, hand written seven page statement. Mr. Avendano signed each page and the police officer witnessing the statement signed each page. That seven page statement never once mentioned respondent's use of the gun set forth in count five of the indictment. Nonetheless, respondent was convicted of the charge. J.A. 30-34.

[3] The indictment originally contained a number of aliases for Mr. Moreno (J.A. 12-20), but no proof was presented that Mr. Moreno had any aliases and those names were struck from the indictment by the trial court. J.A. 42.

In violation of Title 18, United States Code, Sections 924(c)(1) and 2.

While the indictment itself asserted proper venue in New Jersey, the proofs at trial did not support the venue allegation in count five. There is no dispute that count five was factually incorrect in many respects. First, the dates were wrong. The proofs at trial showed the particular weapon was only used and/or carried on January 1, 1995 at the earliest, not December 12, 1994. Second, the place was wrong. The weapon was never carried in New Jersey, only in Maryland. Third, the weapon was not used in connection with the kidnapping of Marbel Avendano. Fourth, the weapon was not used in connection with the drug conspiracy, a charge which was eventually dismissed, as against Respondent, by the trial judge at the end of the government's case. In short, there was little or nothing alleged in count five which was factually correct.

At the close of the government's case in chief, respondent moved to dismiss count five on venue grounds.[4] The trial court denied the Motion for Judgment of Acquittal brought pursuant to Federal Rule of Criminal Procedure 29. In denying the motion the trial court relied on the decision in *United States v. Pomranz*, 43 F. 3d 156 (5th Cir.), *cert. denied*, 516 U.S. 986 (1995), and rejected the decision in *United States v. Corona*, 34 F. 3d 876 (9th Cir. 1994).

Respondent was sentenced to 87 months imprisonment on counts one, two and three, all to run concurrently,

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[4] Had the indictment properly advised the defendant that the only acts supporting count five occurred in Maryland, the defendant would have had to raise his venue challenge before trial. When, however, the indictment asserts proper venue but the government fails to establish venue at trial, the defendant can move for judgment of acquittal at that time. *United States v. Sardini*, 803 F.2d 123, 127 (3d Cir. 1986), *cert. denied sub nom, Moody v. United States*, 479 U.S. 1093 (1987).

and a consecutive sentence of 60 months imprisonment on count five for a total sentence of 147 months imprisonment. Pet. App. 8a, n.2.

Respondent filed a Notice of Appeal and his case was heard in the United States Court of Appeals for the Third Circuit on November 12, 1996. On July 30, 1997, a divided panel of that court reversed respondent's conviction on count five. All of respondent's and codefendants' other convictions were affirmed. Pet. App. 40a.

The government filed a petition for rehearing *en banc* as to the count five venue question only and that petition was denied on September 26, 1997. J.A. 4-5.

SUMMARY OF ARGUMENT

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed." The Constitutional provisions, however, "do not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute. *Johnston v. United States,* 351 U.S. 215, 220 (1955) (emphasis added). Venue issues are discrete; in each case the statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales,* 118 S. Ct. 1772, 1776 (1998) (quoting *United States v. Anderson,* 328 U.S. 699 (1946)). In deciding where an offense was committed and thus where venue lies, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales,* 118 S. Ct. at 1776 (quoting *Anderson,* 328 U.S. at 703).

Venue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense. This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis

—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the actus reus), then it is determined where that conduct was "committed," and thus where venue lies. Pursuant to this accepted analysis, the Third Circuit correctly determined that the firearm offense was "committed" in Maryland.

The *actus reus* element of 18 U.S.C. § 924(c)(1) is the *use* or *carrying* of a firearm *during* and in relation to a crime of violence. Congress enacted the statute to punish the unlawful use of firearms. While the commission of an underying felony is an element of 18 U.S.C. § 924(c)(1), the underlying offense is not the actus reus of 18 U.S.C. § 924(c)(1).

In this case, there is no dispute that the firearm which respondent was charged with using was used only in the State of Maryland and in no other place. Respondent's trial on the 18 U.S.C. § 924(c)(1) charge could be held only in the State and District of Maryland and at no other place.

The crime of using a firearm during the commission of a violent crime "begins" when the gun is first used or carried during the violent crime and "ends" when a gun is no longer used or carried during the violent crime. In other words, this crime is committed only when a gun is used or carried and not when the underlying crime occurred.

Prosecuting the firearm offense anywhere other than Maryland, where the crime was "committed," would disrespect the Constitutional provisions and the policies underlying them. The Constitution demands that crimes be prosecuted where the crime is "committed"; and the Constitutional safeguards of venue are for the protection of the accused, not the government. Finally, the "acts" test, while respecting the Constitutional venue provisions, will not seriously impede the effective prosecution of firearm crimes or other crimes as the government suggests.

ARGUMENT

The government argues that the trial for a criminal offense may be conducted in any district where an essential element of the crime occurred. Br. of Petitioner at 24.[5] The government's position is incorrect. The government's reliance on an "essential elements" test is unfounded and unworkable. It would expand venue well beyond the limits set in the Constitution and adopted by this Court. The test adopted by this Court is not an essential elements test, but a "nature of the crime" or "*actus reus*" test.[6] As this Court stated in *Anderson* and *Cabrales*, the *locus delecti* must be determined from the *nature of the crime alleged* and the location of the act or acts constituting it." *Cabrales*, 118 S. Ct. at 1776 (quoting *Anderson*, 328 U.S. at 703) (emphasis added). In this case, the "nature" of the crime alleged is the unlawful use of a weapon. The location of the act constituting the crime was respondent's use of the weapon in the state of Maryland. Respondent's crime, the use of the weapon, began and ended in Maryland and did not occur in the state of New Jersey.

The government also argues that 18 U.S.C. § 924(c)(1) has more than one *actus reus* and that venue is proper in any district where the *actus reus* was committed. In determining venue, the Court should look at the "nature of the crime alleged and the location of the acts constituting it." *Cabrales*, 118 S. Ct. at 1776. Here the crime alleged is the use of a firearm during a violent crime and Maryand was the sole location of the *actus reus* that constitutes the crime.

[5] In support of this proposition, the government cites numerous conspiracy cases and aiding and abetting cases. Br. of Petitioner at 15-16 and n.4-n.6. Respondent does not dispute the general rule of law that a conspiracy trial can be held in any district where an overt act occurred. In this case, respondent was charged with a substantive count of violating 18 U.S.C. § 924(c)(1), not a conspiracy to violate that section. He alone was charged in count five. While count five of the indictment alleged that respondent aided and abetter others in violation of 18 U.S.C. § 2, J.A. 20, that theory of culpability was not advanced at trial and was not submitted to the jury. J.A. 61-63. Count five of the indictment describes activity in which Rodriguez-Moreno "alone, untied to others, engaged." *Cabrales*, 118 S.Ct. at 1777.

[6] *Actus reus* denotes "such result of human conduct as the law seeks to prevent." 1A C.J.S. *Actual*, 773 (1985).

I. THE CONSTITUTION DEMANDS THAT A CRIMINAL DEFENDANT BE TRIED WHERE THE ACTS OF THE ACCUSED THAT VIOLATE A STATUTE OCCURRED.

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed."[7] To "underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime was respondent's use of the weapon in the state *Johnson*, 323 U.S. 273, 275 (1944) (quoting U.S. CONST. Sixth Amend.).[8] Thus, by Constitutional command, venue may only be placed *where the crime was committed*. *United States v. Cores*, 356 U.S. 405, 407 (1958) ("The Constitution makes it clear that determination of proper

[7] The Constitution of the United States provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed." U.S. CONST. art. III, § 2, cl. 3.

[8] Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and have the Assistance of Counsel for his defense." U.S. CONST. amend VI.

venue in a criminal case requires determination of where the crime was committed.")

The Constitutional provisions, however, "do not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute." *Johnston*, 351 U.S. at 220 (emphasis added); *accord United States v. Anderson*, 328 U.S. 699, 705 (1946) ("It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation.") (emphasis added).

Venue issues are discrete; in each case the statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703; *accord Travis v. United States*, 364 U.S. 631, 635 (1960) ("The decisions are discrete, each looking to the nature of the crime charged."). In deciding where an offense was committed and thus where venue lies, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 118 S.Ct. at 1776, *Anderson*, 328 U.S. at 703.

In determining where a crime was "committed," and thus where venue lies, venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of "'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (quoting *United States v. Johnson*, 323 U.S. 273, 275). Thus, analysis begins "from the premise that questions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.'" *Id.*

II. VENUE WAS ONLY PROPER IN MARYLAND BECAUSE THAT IS WHERE THE RESPONDENT'S ALLEGED *ACTUS REUS* OCCURRED.

The government concedes that venue is only proper "in a district where the defendant commits (or is legally responsible for) an *actus reus* element of the offense." Br. of Petitioner at 13. Nevertheless, the government contends that venue was proper in New Jersey. The government's contention is based on an erroneous interpretation of the statute. First, the government erroneously omits the "during" requirement from the statute by claiming that under the statute the defendant must only "commit another federal crime (here, a crime of violence) *and* use or carry a gun in relation to that crime." Br. of Petitioner at 25 (emphasis in original). By reading the "during" requirement out of the acts, the government is able to argue that there are, in fact, two *actus reus* elements to the firearm statute: [1] the use of the gun and [2] the commission of the crime of violence. *Id.* at 19. Consequently, the government claims that venue is proper because while the first element (the use of the gun) occurred only in Maryland, the second element (the commission of the crime of violence) occurred in both Maryland and New Jersey. *Id.* at 19-20. The government is wrong.

The government is incorrect in claiming that the New Jersey kidnapping is "an essential element of the [firearm] crime." Br. of Petitioner at 24. If the government proved that respondent *used* or *carried* a firearm in Maryland (the first *actus reus* of the government's erroneous definition of 924(c)(1)), and then it proved that the respondent went to New Jersey, either before or after he used or carried the firearm, and he *committed an act of violence* in New Jersey (the second actus reus of the government's erroneous definition of 924(c)(1)), the government could not sustain a conviction because the government must prove that the firearm was used *during*

a crime of violence. See *United States v. Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1986) (Kennedy, J.) ('[t]he relation between the firearm and the underlying offense is an essential element of the crime"). Consequently, the New Jersey kidnapping is completely irrelevant to the firearm crime, because respondent did not *use* or *carry* a gun *during* the New Jersey crime.

Contrary to the government's claims, there is exactly one *actus reus* for this statute, namely that the defendant used or carried a firearm *during and in relation to* a crime of violence. The *actus reus* is not the use of a firearm, instead it is that the defendant used the firearm during another federal crime. *Correa-Ventura*, 6 F.3d at 1083. Therefore, venue must be where the *actus reus* of the crime occurred, namely in Maryland. *Cabrales*, 118 S. Ct. at 1776.

Moreover, the firearm crime cannot be prosecuted in New Jersey because it is not a continuing offense. *Cf. United States v. Cores*, 356 U.S. 405, 408 (1958) (Crime of remaining in the United States after the expiration of a landing permit for visiting sailors is continually violated in every district the defendant goes after the permit expires); *Armour Packing Co. v. United States*, 209 U.S. 56, 74 (1908) (Crime to procure transportation of goods at a lower rate than the published tariffs is committed "[w]herever such transportation is received"). A continuing offense is simply an offense that is "committed" in more than one district, and therefore can be prosecuted in more than one district.[9] 18 U.S.C.

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[9] Conspiracy, which is a subset of the "continuing offense" doctrine is not at issue in this case; however, the analysis herein applies equally to a conspiracy. Conspiracy, like many crimes is capable of being a "continuing offense". *See, e.g., Hyde v. United States*, 225 U.S. 347, 361-366 (1912). The crime of conspiracy consists of the "agreement" to accomplish criminal means, and the crime is "committed" by the various acts of conspirators that show their adherence to the common scheme. *Id.* So wherever any co-conspirators commit *acts* in furtherance of the conspiracy, that is where the "agreement", or part of it, took place. *Id.* Courts have reasoned that the defendant's own act—that of agreeing or signing on to the conspiracy or the organization—incorporates by reference the acts of others and makes him vicariously liable for them. *See id.* (recognizing a "constructive" presence of coconspirators in the district where acts in furtherance of conspiracy were committed). But in the firearm context here, there is no act by the defendant that signals an agreement with the other defendants to violate the firearm statute at issue in the instant case.

§ 3237(a). Thus, in the context of a "continuing offense," the crime is committed "wherever the wrongdoer roamed." *Travis*, 364 U.S. at 634 (citing *United States v. Cores*, 356 U.S. 405).[10] In the instant case, the respondent did not "roam" with the firearm; consequently, the firearm violation was not a continuing offense. Indeed, § 3237 only applies to crimes that are "committed" in more than one district. Stated another way, even Congress cannot specify that a trial for a crime can be held somewhere other than where the crime was "committed." In this regard, this Court has cautioned that § 3237 must be "read in light of the Constitutional requirements and the explicit provision" of the offense. *Travis*, 364 U.S. at 637; see also *Johnston*, 351 U.S. at 220 (Douglas J., dissenting) (Statute should be construed against the two historic Constitutional provisions, and any doubts should be resolved in favor of the citizen). Therefore, § 3237 can *only* Constitutionally apply to crimes that are "committed" in more than one place.

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[10] *Cores* was possibly more limited a holding than *Travis* indicated. In *Cores*, the Court held that venue was proper where the defendant was "found"—it did not decide the issue of whether the defendant could be prosecuted in any district where he may have been after the expiration of the permit. *Cores*, 356 U.S. at 409.

III. THE COURT'S DECISION IN *CABRALES* REQUIRES THE REVERSAL OF RESPONDENT'S CONVICTION.

Last term, the Court clearly held that venue must be determined by the acts of the accused that violate a statute. *Cabrales*, 118 S. Ct. at 1776; *Johnston*, 351 U.S. at 220; see also *Anderson*, 328 U.S. at 703-705 ("It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation." (emphasis added)); *id.* at 703 (Statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it."). Nevertheless, the government argues that the Court should ignore *Cabrales's* holding and find that venue was proper in New Jersey even though the acts of the accused which violated the statute did not occur in New Jersey. See, Br. of Petitioner at 28-30. Once again, the government is wrong.

In *Cabrales*, the Court held that venue in a money laundering case was improper in Missouri, the state that was the source of the money that was laundered. *Cabrales*, 118 S. Ct. at 1777. Although the Court disagreed with the government regarding whether venue could be based on the "essential element" of where the underlying crimes occurred, see *Cabrales*, 118 S. Ct. at 1776, the government now raises the exact same argument and asks this Court to find that venue was proper in New Jersey because that is where the "essential element" of the underlying crime occurred. Br. of Petitioner at 24.

The government argues that this Court found venue improper in *Cabrales* because the defendant had not been charged with a substantive crime in Missouri. Br. of Petitioner at 28-29. The government's analysis if *Cabrales* is incorrect. Venue was improper in Missouri, in *Cabrales*,

because the defendant had not committed the *actus reus* that violated the money-laundering statute in Missouri. *Cabrales*, 118 S.Ct. at 1776-1777. Likewise, respondent had not committed the *actus reus* that violated the firearm statute in New Jersey. As explained *supra*, the *actus reus* that violates § 924(c)(1) is "*carrying or using* a firearm *during* a crime of violence." 18 U.S.C. § 924(c)(1) (emphasis added). As the respondent did not commit the *actus reus* in New Jersey, *Cabrales* requires this Court to reverse the respondent's conviction.

Moreover, contrary to the government's arguments, the government's venue claim was stronger in *Cabrales* than it is in the instant case. One of the elements of money laundering is that the proceeds must result from unlawful activity or other crimes. See, 18 U.S.C. § 1956(a)(1). Consequently, one of the elements of the charged crime occurred in Missouri and the government had, at least, a weak claim that venue should be based there. Here, on the other hand, the fact that the kidnapping occurred in New Jersey is completely irrelevant to the firearm charge. The government had to prove that the gun was used *during* the kidnapping.

Consequently, the fact that there was a kidnapping in New Jersey previous to the gun being used, did not in anyway establish that the gun was used during a kidnapping that occurred in New Jersey.

In sum, *Cabrales* requires the reversal of respondent's conviction because *Cabrales* requires venue to be based on the acts of the offender that violate the statute, and the respondent did not commit any acts that violate the firearm statute in New Jersey. Moreover, unlike *Cabrales*, there was no element of the crime that occurred in an improper venue state.

IV. THE THIRD CIRCUIT CORRECTLY APPLIED THE ACTIVE VERB TEST IN HOLDING THAT VENUE WAS IMPROPER IN NEW JERSEY.

This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the *actus reus*), then the court determines where that conduct was "committed," and thus where venue lies. The holdings and language of *Cabrales*,[11] *Travis*,[12] *Cores*,[13] *Johnston*,[14] *Anderson*,[15] *Johnson*,[16] *Midstate Horticultural Company*,[17] *Lombardo*,[18] *Freeman*,[19] as well as all other precedent of this Court, confirm this approach.

The court below, along with a number of other circuit courts has reflected this emphasis on the *acts* in determining venue when employing the "key verbs" analysis: the crime is "committed" where the person does the *act* prohibited by the "key verb".[20] The key verb test is an

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[11] 118 S. Ct. at 1775-1776.

[12] In *Travis*, the Court focused on the statutory phrase "on file with the Board" to determine that the statute penalized "only the single act of having a false statement at a specified place"; thus, the Court held venue to be proper only where the false statement was filed. 364 U.S. at 635-637.

[13] In *Cores*, the Court focused on the verb "remains" to determine that the crime is "committed" wherever the defendant "remains" after expiration of the landing permit; thus, holding that the venue is proper and the crime can be prosecuted where the defendant "willfully remains after the permit expires." 356 U.S. at 409.

[14] In *Johnston*, the Court focused on the statutory phrase "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title" to determine that "where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." 351 U.S. at 220.

[15] In *Anderson*, the Court analyzed the statute to determine that it mandated the defendant "to take the oath"; the Court, finding that the place of performance and the place of refusal to *act* were identical, held that venue is proper in that district in which the defendant "acted" by refusing "to take the oath". 328 U.S. at 706.

[16] In *United States v. Johnson*, 323 U.S. 273 (1944), all nine justices analyzed the case by focusing on the verb phrase "use the mails"; the disagreement between the majority and the dissent centered upon the issue whether that phrase denoted a "continuing offense", not whether venue could be placed by focusing on other elements of the crime.

[17] In *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166-167 (1939), the Court focused on the statutory language of "granting and receiving of rebates" to hold that venue was improper in a district other than where the "granting" or "receiving" were alleged to have occurred.

[18] In *United States v. Lombardo*, 241 U.S. 73, 76 (1915), the Court focused on the verb "file" as being the criminal act. The Court, in rejecting the government's attempt to characterize the crime as a "continuing offense", stated that it is "constrained by the meaning of the words of a statute." *Id.* at 78.

[19] In *United States v. Freeman*, 239 U.S. 117, 119-120 (1915), the Court, equating the statutory language "ship" to "transport", held that a statute making it a crime to "ship" into any other State any package of intoxicating liquor could be prosecuted where the liquor was shipped.

[20] The First, Third, Fourth, Eighth, Ninth and Tenth Circuits have adopted the "verb test," which analyzes the operative verbs, key terms, and policies underlying the statute defining the offense. *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine 'the key verbs in the statute defining the criminal offense' to find the scope of the relevant conduct." (quoting *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980)); *United States v. Donahue*, 885 F.2d 45, 50 (3d Cir. 1989) ("[L]ook at the statutory verb in the description of the offense in determining where an offense was committed."); *United States v. Cofield*, 11 F.3d 413, 416 (4th Cir. 1994) ("[W]e have adopted the 'verb test' as an interpretative aid"); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997) (applying the "active verb" or "key verb" test to the Child Support Recovery Act); *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) (Ninth Circuit adopted "key verbs" test, which examines the verbs in a statute that defines the criminal conduct to determine where the offense was committed.); *United States v. Ryan*, 894 F.2d 355, 360 (10th Cir. 1990) ("Courts usually examine the verbs employed in the

accepted and useful tool utilized by courts to determine the place for trial when the statute does not specically set forth venue. One commentator has referred to the "key verb" test as "the first method for determining proper venue in offenses lacking venue provision." 25 Moore's Federal Practice § 618.05[3][b][I] at 618-13, -14 (3d ed. 1982) citing *United States v. Anderson*, 328 699, 703 (1946) (other citations omitted).

This key verb test was correctly applied by the Third Circuit in the instant case. In reversing respondent's conviction, the Court below applied the "verb test" and found that "18 U.S.C. § 924(c)(1) unambiguously designates the criminal conduct that is prohibited as 'using' or 'carrying' a firearm. Pet. App. 15a. The court concluded that since the carrying or using of a firearm occurred only in Maryland, "Moreno could only have been properly tried in Maryland." *Id.* Moreover, if "Congress has not provided an express venue provision in conjunction with a criminal offense [the Court should look] to the verbs defining the criminal offense and the purpose underlying the current statute to determine proper venue." [21]

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statute to define the offense."); *United States v. Medina Ramos*, 834 F.2d 874, 876 (10th Cir. 1987).

[21] Other circuit courts have adopted the so-called "substantial contacts" test to determine venue which takes into account a number of factors, the most important being the site of the defendant's acts. The "substantial contacts" test, first articulated by the Second Circuit and since adopted by the Sixth and Seventh Circuits, takes into account a number of factors including the site of defendant's acts and the effect of the criminal conduct. *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188-89 (2nd Cir. 1989); *United States v. Williams*, 778 F.2d 1213, 1215 (6th Cir. 1986); *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Chappel*, 854 F.2d 190, 193 (7th Cir. 1988). Regardless of the name, there is no appreciable difference between the lower court "tests" for determining venue—each looks to the language of the statute to determine the *actus reus* of the crime.

United States v. Crawford, 117 F.3d 137, 139 (4th Cir. 1997) (citations omitted).

In this case, use of the verb test is extremely helpful because it supports Congress's clear intent to prevent the use of the firearm and not to merely treat this separate crime as a sentence enhancement. See *infra* at 26-27. Because Congress has not provided "an express venue provision" for 18 U.S.C. § 924(c)(1), the Court should look to the statute's verbs "using" and "carrying" as describing the conduct that Congress outlawed; i.e., using or carrying a weapon. Both the purpose underlying the criminal statute and the key verb test require that the trial be conducted where the weapon was used and carried.[22]

As stated above, *Cabrales*, *Johnston* and *Anderson*, and all other precedent of this Court, suggest that the answer to the question of venue is to be found by analyzing each particular statute to determine the "acts" of the defendant that constitute the commission of the crime. *Cabrales*, 118 S.Ct. at 1776, *Johnston*, 351 U.S. at 220; *Anderson*, 328 U.S. at 705. Whether called the "acts" test, the "key verb" test, the "substantial contacts" test, or some other name, the same analysis is being performed—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, actus reus), then it is determined where that conduct occurred, and thus where venue lies. Venue

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[22] Commentators have likewise confirmed the wisdom of this approach. See Charles A. Wright, *Federal Practice and Procedure*, § 302, at 199 (2d ed. 1982) (focuses on key verbs of statute to determine where the crime is committed); Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751, 777 (1962) (author finds the "verb test" important first step in determining venue in a multi-district conspiracy); Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289 (1926) (The "essential verb usually contains the key to the solution of the question: in what district was the crime committed.").

must be based on the "actus reus" element of the crime. Stated differently, venue cannot be based on the locality (if one exists) of any of the other elements of the offense. Determining venue on anything other than the "actus reus" of the defendant is unconstitutional, arbitrary, confusing, and will produce ad hoc decisions. In contrast, by focusing on the *act* that a statute makes criminal, the result is predictable and clear.

V. PROSECUTING THE FIREARM OFFENSE ANYWHERE OTHER THAN MARYLAND, WHERE THE CRIME WAS "COMMITTED", WOULD DISRESPECT THE CONSTITUTIONAL PROVISIONS AND THE POLICIES UNDERLYING THEM.

A. The Constitutional Safeguards Of Venue Are For The Protection Of The Accused, Not The Government.

The Constitution demands that crimes be prosecuted where the crime takes place. As the Court cautioned in *Johnson,* an expansive interpretation of venue could lead to needless hardship on the defendant who is forced to defend himself far from home and available defense resources, and could lead to "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." 323 U.S. at 275; *Travis,* 364 U.S. at 634 ("We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it.").

Constitutional venue provisions are, first and foremost, for the protection of the accused. It may be more convenient for the government to prosecute respondent in New Jersey, but the Constitution is concerned about what is fair for those accused of crimes. As the lower court correctly noted, "Essentially, the government wants to have the *option* of venue—that is it does not want to be *restricted* to trying these cases" where the violation occurred. Pet. App. 16a. The Third Circuit had little sympathy for the government's argument regarding the hardship and inconvenience of having to prosecute the crime where it was committed. Pet. App. 16a. The court stated:

> Many constitutional guarantees for criminal defendants are inefficient and costly—the right to counsel comes to mind. Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away. *United States v. Johnson,* 323 U.S. 272, 276, 65 S.Ct. 249, 251, 89 L.Ed 236 (1944) ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy."). Pet. App. 16a.

The right to be tried where the crime was "committed" was one of the most important rights to the framers of the Constitution.[23] It was one of the few rights that is included in both the original text of the Constitution and the Bill of Rights. As one commentator put it: "With the adoption of this venue proposal, citizens of the United States were assured that constitutional limitations on venue had been established. Citizens could not be transported beyond the boundaries of the state in which the crime had been committed for the trial of the crime."

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[23] The venue provisions contained in the constitution were in reaction to English laws that permitted colonists as well as British soldiers to be tried in England when the alleged crime was committed in America. *See* Drew L. Kershen, *Vicinage,* 29 Okla. L. Rev. 801, 806-808 (1976). Resentment against these laws was so deep that the Declaration of Independence denounced King George III "[f]or transporting us beyond Seas to be tried for pretended offenses." *Id.* at 807. Indeed, this practice of England has been described as one of the precipitating factors of the American Revolution. *See, e.g.,* William H. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue,* 43 Mich. L. Rev. 59, 63-67 (1944).

Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 808 (1976). Likewise, the government should not be allowed to transport respondent beyond the boundaries of Maryland, the only jurisdiction where he may have broken the firearms law.[24]

B. The "Acts" Test, While Upholding The Constitutional Venue Provisions, Will Not Undercut The Effective Administration Of Criminal Laws.

Contrary to the government's assertion, the "acts" test will not "unudercut the effective administration of criminal law." Br. of Petitioner at 30. The government contends that trying the firearm charge in Maryland will lead to ineffective administration of justice for three reasons. First, the government claims that it could try respondent twice, once for the kidnapping and once for using a firearm. *Id.* The government asserts that if this Court requires that the trial for a violation of 18 U.S.C. § 924 (c)(1) be held where the firearm was used or carried, the defendant could be forced to trial twice, in two different locations. Such an approach, "would do little to benefit respondent." Br. of Petitioner at 30.

In fact, such a rule would benefit respondent. If Mr. Moreno were charged with the kidnapping in New Jersey and charged with the weapons offense in Maryland, he could exercise his Constitutional rights and demand that he be tried twice. He could also, however, elect to utilize Federal Rule of Criminal Procedure 21 and move to have the cases tried together in either district.

Federal Rule of Criminal Proceure 21(b) provides:

> For convenience of parties and witnesses, and in the interest of justice, the court *upon motion of the defendant* may transfer the proceedings as to that defendant or any one or more of the counts thereof to another district. (emphasis added).

[24] Furthermore, the convenience of the government is irrelevant, both because policy considerations can never trump the Constitution and also because the government has never claimed that it could not prosecute respondent in Maryland.

Certainly the government would have no objection if respondent wanted to have all of the charges tried in the District of New Jersey. Respondent could waive his Constitutional right to venue just as he could waive other Constitutional rights.

Next, the government claims that if respondent's prosecution under 18 U.S.C. § 924(c)(1) were held in Maryland, the government would "in effect, be required to prove the kidnapping offense twice." Br. of Petitioner at 30. This assertion is incorrect. The government would be free to try both the kidnapping of Mr. Avendano and the firearm charge in Maryland and there would be only one trial.

If, however, the government elected to try the case twice, the kidnapping of Mr. Avendano would have already been tried in New Jersey. If respondent were acquitted of that offense,[25] there would be no subsequent prosecution on the firearm charge anywhere. Even if respondent were previously convicted in New Jersey of kidnapping Mr. Avendano, the government's subsequent prosecution in Maryland would have to establish that the kidnapping continued into Maryland and that the firearm was used there. In any event, the unique set of facts in respondent's case can hardly be described as a major burden to the government.

[25] Count five of the indictment alleged three underlying offenses; the drug transaction, the kidnapping of Mrs. Avendano and the kidnapping of Mr. Avendano. Respondent was acquitted of the drug charge at the close of the government's case in chief. Pet. App. 7a-8a. The firearm which was the subject of count five was not used in the kidnapping of Mrs. Avendano. Br. of Petitioner at 7, n.2. Count three which charged the kidnapping of Mrs. Avendano was incorrectly submitted to the jury as one of the underlying offenses of count five. *Id.*

Finally, the government acknowledges that while the Sentencing Guidelines enhancements for the use of a weapon are helpful, they do not fully accomplish the legislative goal of enhanced punishment. Br. of Petitioner at 31-32. That additional punishment is, according to the government, not enough of an enhancement and respondent's conviction should thus be reinstated. "The difference would not be negligible here, and nothing in the Constitution's venue provision justifies such a windfall for the defendant." Br. of Petitioner at 33.

The venue provisions in the Constitution are for the protection of the defendant in a criminal case. If those provisions result in a "windfall" for the defendant, such a windfall would certainly be short lived. Common sense suggests that the greater the windfall, the greater the chance that the government will muster its resources and try the defendant a second time. When a defendant successfully challenges venue, the government is entitled to try him again in the proper district. *United States v. Scott*, 437 U.S. 82, 98-99 (1978).

In many cases, however, the government may elect to proceed under the Sentencing Guidelines without resorting to 18 U.S.C. § 924, as it did in this case with five of the respondent's codefendants. Through the adoption of the United States Sentencing Guidelines, Congress has provided for enhanced penalties where a gun was used in connection with a serious felony. For the most part, the Guidelines provide for increasing the particular offense level by two or more levels if a firearm was used. See, for example, U.S.S.G. § 2A2.2(b)(2) (an increase of three to five levels for use of a firearm in an aggravated assault); U.S.S.G. § 2A2.4(b)(1) (a three level increase for possession of a firearm when obstructing or impeding officers); U.S.S.G. § 2A3.1(b)(1) (an increase of four levels for the use or display of a dangerous weapon in a sexual assault); U.S.S.G. § 2A4.1(b)(3) (an increase of two levels if a dangerous weapon was used in a kidnapping, abduction or unlawful restraint); U.S.S.G. § 2A6.2(b)(1)(C) (an increase of two to four levels for possession or use of a dangerous weapon in a stalking or domestic violence case); U.S.S.G. § 2B2.1(b)(4) (an increase of two levels if a dangerous weapon was used during the course of a burglary); U.S.S.G. § 2B2.3(b)(2) (an increase of two levels if a firearm was used during a trespass); U.S.S.G. § 2B3.1(b)(2) (an increase of between three and seven levels if a weapon was used during a robbery); U.S.S.G. § 2B3.2(b)(3) an increase of between three and seven levels if a weapon was used during an extortion); U.S.S.G. § 2B5.1(b)(3) (an increase of at least two levels if a firearm was used in a counterfeiting offense); and U.S.S.G. § 2D1.1(b)(1) (a two level increase if a weapon was possessed in any drug transaction). In many cases, these multi-level increases permit sentence increases well in excess of the 60 months permitted by 18 U.S.C. § 924(c).

In this case, one of respondent's codefendants, Milton Palma-Ruedes was sentenced to 135 months imprisonment. Pet. App. 8a. Like respondent, he was convicted of the kidnapping counts and the drug count was dismissed against him at the end of the government's case in chief. *Id.* at 7a-8a. While Palma-Ruedes was not charged under 18 U.S.C. § 924(c)(1), he received a two level enhancement for possessing a firearm during the kidnappings. In many respects, his case was most similar to respondent's. Respondent, on the other hand, was sentenced to 147 months. *Id.*

The Judgment of the United States Court of Appeals for the Third Circuit was corrected on September 3, 1997 in response to a motion made by the government. The corrected judgment provides that "the remaining judgments against Moreno are vacated and remanded for sentencing." J.A. 2-3. If respondent is resentenced, the trial court would raise his offense level by two levels because

he possessed a weapon. The resulting sentencing range would be 108-135 months. If the government chooses not to prosecute respondent in Maryland, his "windfall" could be as little as 12 months and at most 39 months. A sentence of 135 months would be identical to that of codefendant Palma-Ruedes.

In any event these policy arguments cannot trump the Constitution. If, on occasion, the government is slightly inconvenienced, its complaint is with the Framers who, in both the Constitution and the Bill of Rights, required all crimes to be prosecuted in the state where they were committed.

VI. THE SPARSE LEGISLATIVE HISTORY DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT 18 U.S.C. § 924(c) IS BASICALLY A SENTENCING ENHANCEMENT.

18 U.S.C. § 924 was enacted by Congress to prevent and punish weapons offenses, yet the government relies on the dissenting opinion below for the proposition that "a central focus, if not *the* central focus, of the statute is the commission of the underlying crime."[26] Br. of Petitioner at 9, Pet. App. at 49a-50a. The legislative history and case law, however, do not support that proposition.

Congress was certainly not focusing on the underlying crime when it enacted and later revised 18 U.S.C. § 924. It clearly was focusing on gun control and punishing the

[26] Indeed, the dissent rewrites the statute by changing key phrases which would "presumably permit venue in any district in which the crime of violence or drug trafficking crime was committed." Pet. App. 42a-43a. The suggested change, however, would create a very different statute where the use or carrying of a weapon is a mere sentencing enhancement to the underlying crime. Both this Court and Congress have held that 18 U.S.C. § 924(c)(1) was not merely a sentencing enhancement, but a new crime altogether. *Simpson v. United States*, 435 U.S. 6, 10 (1978); S. Rep. No. 98-225, at 313 (1983).

prohibited use of weapons. 18 U.S.C. § 924(c)(1) was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223-1224. The House Bill (H.R. 17745) was intended to amend Title 18 of the United States Code to "provide for better control of interstate traffic in firearms." 114 Cong. Rec. 22,223 (1968). The Congressional findings set forth the national problems presented by firearms and other weapons. *Id.*[27] Thus, 18 U.S.C. § 924 was enacted with the sole focus of prohibiting and punishing the illegal use of weapons. There is no focus, central or otherwise, on the underlying crimes.

18 U.S.C. § 924 has been amended on numerous occasions. In 1983, 15 years after its original enactment, major revisions to the statute were adopted. At that time, Congress adopted this Court's decision in *Simpson v. United States*, 435 U.S. 6 (1978) and found that "Section 924 (c) sets out an offense distinct from the underlying felony and is not simply a penalty provision." S. Rep. No. 98-225, at 313 (1983). Therefore, the dissent's below reliance on the legislative history to imply that this statute is nothing but a sentencing enhancement for the underlying felony is seriously misplaced.

[27] The Congressional debate did not focus on any underlying crimes. When discussing the enactment of 18 U.S.C. § 924, Congress debated, for the most part, whether they could Constitutionally apply Federal weapons violations on state crimes prosecuted in state courts. 114 Cong. Rec. at 22,229-22,234. In limiting the application of 18 U.S.C. § 924 to federal crimes, Congress eventually agreed with the suggestion that "this new Federal crime we are creating should remain within its own boundaries and not trespass upon the domain of the States." *Id.* at 22,232.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. *The Actus Reus Elements of 18 U.S.C. 924(c)(1)*

Respondent does not take issue with our submission (U.S. Opening Br. 13-18) that venue for an offense is proper in a district where the defendant commits any *actus reus* element of the offense. To the contrary, he agrees (MS Br. 6)[1] that "[v]enue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense." He contends, instead, that the only *actus reus* element of the offense defined by 18 U.S.C. 924(c)(1) is the use or carrying of a firearm. While he acknowledges (MS Br. 7) that the defendant's commission of a crime of violence or a drug trafficking

[1] As of the date of the filing of this reply brief, respondent's brief on the merits had not yet been printed. References to "MS Br." are to the typescript version of respondent's brief.

crime is an *element* of the Section 924(c)(1) offense, he contends that the defendant's commission of such a crime is not an *actus reus element* of that offense. Evidently, he believes that the commission of the related felony is merely a circumstance of the crime that can have no bearing on venue.

Respondent's argument is in error, for the commission of the "crime of violence or drug trafficking crime" is an *actus reus* element of the Section 924(c)(1) offense. "In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur." *United States* v. *Apfelbaum*, 445 U.S. 115, 131 (1980). Although the phrase "*actus reus*" does not have a universal meaning,[2] it generally conveys the principle that a criminal offense requires an element of action by the defendant. See *United States* v. *Shabani*, 513 U.S. 10, 16 (1994); see also 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* 272 (1986) (LaFave & Scott); Model Penal Code § 2.01(1); Oliver Wendell Holmes, *The Common Law* 54 (1881).

The elements of a crime may *also* require proof of external circumstances that bring the act within the reach of the statute. Such circumstances, however, are

[2] The phrase appears to derive from the maxim "actus non facit reum, nisi mens sit rea," which can be translated as "the act itself does not make a man guilty, unless his intention be so." John M. Cottrell, *A Collection of Latin Maxims and Phrases* 9 (1897). While the literal meaning of "*actus reus*" is a "bad act," in technical legal use it generally refers to the defendant's voluntary conduct (and sometimes the conduct's results) as distinguished from the mental element of the crime. See generally 1 *Encyclopedia of Crime and Justice* 15 (Sanford H. Kadish et al., eds., 1983). While the underlying concept may have common law origins, "[t]he term 'actus reus' apparently was not used by scholars in criminal law treatises prior to the twentieth century." Joshua Dressler, *Understanding Criminal Law* 63 (1987).

distinguishable from the *actus reus* itself. In the federal system, for example, a crime may require proof of jurisdictional facts, which do not, strictly speaking, form part of either the act or the intent. In addition, a crime may require proof of circumstances that influenced the character of the act but are not the act itself. A charge of perjury, for example, requires proof that the witness had been previously sworn, but the act is the uttering of the falsehood. See generally 1 LaFave & Scott, *supra*, at 273.[3]

In contrast to an element of the crime that describes its external circumstances, the *actus reus* is usefully understood as the specific voluntary act or acts that the defendant performs (or for which the defendant is legally responsible) and that constitutes the conduct targeted for criminal punishment. Cf. *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) (interpreting *Robinson* v. *California*, 370 U.S. 660 (1962), to mean that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing,

[3] Some commentators suggest that the "*actus reus*" should be understood to include all of the external circumstances and results of the defendant's action, *i.e.*, everything but the *mens rea* itself. See, *e.g.*, Glanville Williams, *Criminal Law: The General Part* 18-21 (2d ed. 1961); but see *id.* at 21 (acknowledging as an "exceptional" case that an aspect of a crime may be viewed as a "condition of offence though not part of it"). That approach may usefully isolate the intent requirement of the criminal law, but "[a] definition of act which encompasses circumstances and consequences, on the other hand, presents a serious problem in determining the termination point of one's acts, and also poses serious analytical difficulties in discussing 'voluntary' acts." 1 LaFave & Scott, *supra*, at 273. The Model Penal Code therefore distinguishes among conduct, an accompanying mental state, and attendant circumstances or results. See Model Penal Code § 1.13.

or perhaps in historical common law terms, has committed some *actus reus*"). That approach to the *actus reus*, which focuses on the acts voluntarily done by the defendant (and distinguishes them from external conditions of the offense), is best suited for applying the Constitution's venue provisions, which call for courts to determine the place (or places) where the defendant's crime "shall have been committed." U.S. Const. Art. III, § 2, Cl. 3; Amend. VI.[4] By requiring crimes to be prosecuted in the State where they were committed, rather than in (for example) the State of which defendant is a citizen, the Framers recognized that there is no unfairness in bringing someone to justice where he has chosen to perform an act constituting an offense. By voluntarily performing an act that society has interest in prohibiting, the defendant subjects himself to the risk of prosecution where that act is done. Cf. Model Penal Code and Commentaries § 2.01, cmt. 1, at 215 (1986) (requirement of voluntary act "focuses upon the conduct that is within the control of the actor"); Holmes, *supra*, at 54 (explaining that "[t]he reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to

[4] As we explain below (pp. 5-6, *infra*), that approach to the *actus reus* also informs the Court's decision in *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), and explains why *Cabrales* does not control this case. We note as well that neither this case nor *Cabrales* involves a situation in which venue was based on the district in which the *results* of the defendant's acts were felt or intended to be felt. Cf. 18 U.S.C. 1512(h) (authorizing venue for witness tampering or obstruction of justice prosecution "in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred").

make a man answerable for harm, unless he might have chosen otherwise").

In the case of Section 924(c)(1), a defendant must choose to commit *two* acts in order to be subject to punishment: he must commit a crime of violence or drug trafficking crime (which is to say, he must commit all the acts necessary for punishment for that offense) *and* he must use or carry a gun during and in relation to that crime. It is not sufficient if the defendant merely uses or carries a gun; if he chooses not to undertake a crime of violence or drug trafficking offense, then he does not violate Section 924(c)(1). Conversely, if the defendant chooses to kidnap a victim but never uses or carries a gun during and in relation to that activity, then no Section 924(c)(1) offense has been committed. Section 924(c)(1) punishes only one who chooses to commit a serious crime *and* chooses to use or carry a gun during and in relation to that crime. See U.S. Opening Br. 22-23; 114 Cong. Rec. 22,231 (1968) (Rep. Poff, explaining that the statute was intended "to persuade the man who is tempted to commit a Federal felony to leave his gun at home").

That characteristic of Section 924(c)(1) explains why respondent's reliance on *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), is misplaced (see MS Br. 15-17). In *Cabrales*, the Court held that venue on charges of money laundering was not proper in the district where the unlawful proceeds were unlawfully generated, when the financial transactions prohibited by the statutes occurred in another district. The Court emphasized that the relevant statutes prohibit only the financial transactions themselves, and not the anterior criminal conduct that generate the proceeds to be laundered. 118 S. Ct. at 1776. In other words, the *actus reus* of the money laundering offense is the conduct of the financial trans-

actions. While the existence of the criminal proceeds is an essential element of the crime—a circumstance of the crime—that the government is required to prove to obtain a conviction on money laundering (*ibid.*), the generation of those proceeds is not part of the *actus reus* of money laundering, because it is not an act that must be performed by the launderer (or anyone for whose conduct the launderer is responsible). Thus, to commit the crime of money laundering, Cabrales was required only to choose to undertake certain financial transactions; she was not required also to choose to undertake the criminal activity that generated the proceeds that were laundered in those transactions. By contrast, to convict respondent for violating Section 924(c)(1), the government was required to prove both that he chose to undertake the kidnapping of Mr. Avendano, and that he used or carried a gun during and in relation to that kidnapping.

Respondent erroneously contends (MS Br. 11-13) that the conclusion that Section 924(c)(1) has more than one *actus reus* reads the element of "during" out of that statute. There is no dispute that the use of the gun must be temporally connected to the crime of violence that it facilitates; as respondent notes (MS Br. 12), if the defendant uses a gun in one State and thereafter begins a crime of violence in another State, the two acts may not be sufficiently contemporaneous to satisfy the "during" element. In this case, however, respondent began the kidnapping of Mr. Avendano in Texas, continued it into New Jersey, and then continued it further into Maryland, where he used the gun. The kidnapping was still continuing in Maryland when the gun was used; accordingly, the gun use did occur during the crime of violence. Because respondent chose to commit one *actus reus* element of Section 924(c)(1), the crime of violence, in New Jersey as well as in Maryland, and because he used the firearm during and in relation to that crime of violence, venue for the Section 924(c)(1) offense was proper in New Jersey.

Respondent also argues that venue in New Jersey is improper because his use of the gun did not occur during "the New Jersey crime." MS Br. 12; see also *ibid.* (arguing that the "New Jersey kidnapping" is not an essential element of the Section 924(c)(1) violation charged in this case); *id.* at 17 ("[T]he fact that there was a kidnapping in New Jersey previous to the gun being used, did not in anyway [*sic*] establish that the gun was used during a kidnapping that occurred in New Jersey."). The fundamental flaw in that argument is that the "crime of violence" in the Section 924(c)(1) count on which respondent was convicted—the single, continuous kidnapping of Mr. Avendano—was a unitary crime. See *United States* v. *Seals*, 130 F.3d 451, 461-462 (D.C. Cir. 1997) (agreeing with courts that have held that crime of kidnapping continues "while the victim remains held and a ransom sought"), cert. denied, 118 S. Ct. 2323 (1998); *United States* v. *Denny-Shaffer*, 2 F.3d 999, 1018-1019 (10th Cir. 1993); *United States* v. *Garcia*, 854 F.2d 340, 343-344 (9th Cir. 1988), cert. denied, 490 U.S. 1094 (1989); see also *United States* v. *Godinez*, 998 F.2d 471, 473 (7th Cir. 1993) (agreeing with defendant that "a kidnapping does not end until the victim is free; * * * one kidnapping is a single crime, rather than, say, one crime per hour of detention"). The fact that the kidnapping spanned several States does not mean that it can be geographically divided into multiple crimes called "the New Jersey kidnapping," "the Maryland kidnapping," and so forth. Rather, the evidence established, and the jury found, that respondent's use of the gun occurred "during and in relation to" the

charged kidnapping, which was committed in part in New Jersey and in part in Maryland. Respondent cannot defeat venue by seeking to create a discrete crime of violence consisting only of the kidnapping acts that took place in New Jersey.[5]

2. *Discrete versus Continuing Offense*

In arguing that venue on the Section 924(c)(1) charge would be proper only in Maryland, respondent and his *amicus* contend that that charge could not be prosecuted in New Jersey because (they argue) the charge is a "point-in-time" offense, not a "continuing" offense for which, under 18 U.S.C. 3237(a), venue would be proper in any district where the offense was begun, continued, or completed. See MS Br. 13-14; NACDL Amicus Br. 10-11. That argument is incorrect. The crime of violence element of Section 924(c)(1) in this case, the kidnapping, was "committed in more than one district." 18 U.S.C. 3237(a). Because that kidnapping was an element of respondent's violation of Section 924(c)(1), his violation in this case was also "committed in more than one district," and may be prosecuted "in any district in which such offense was begun, continued, or completed," including New Jersey. *Ibid.*

At the core of respondent's argument is the contention (MS Br. 30) that "18 U.S.C. § 924 was enacted with the sole focus of prohibiting and punishing the

[5] Indeed, if respondent were correct that the kidnapping offense could be subdivided into multiple geographical crimes, he should have moved for a judgment of acquittal on the ground that the evidence did not establish that his use of the gun was "during * * * the New Jersey crime." Respondent, however, made no such argument, and there is no support for the view that a kidnapping may be divided into as many units of prosecution as the number of States in which it took place.

illegal use of weapons. There is no focus, central or otherwise, on the underlying crimes." That characterization of Section 924(c)(1) is demonstrably incorrect. As the D.C. Circuit has explained, in enacting Section 924(c)(1), "Congress was focusing on the defendant's employment of a gun for the purpose of bringing about the crime [of violence or drug trafficking crime]. In other words, the statute criminalizes the defendant's advancement of his criminal ends by means of a gun, whether carried or deployed in some more active manner." *United States* v. *Anderson*, 59 F.3d 1323, 1326 (D.C. Cir.) (en banc) (emphasis omitted), cert. denied, 516 U.S. 999 (1995); see also *Muscarello* v. *United States*, 118 S. Ct. 1911, 1916 (1998) (noting statute's concern about the "dangerous combination" of "drugs and guns"); *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.) (observing that "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated * * * the commission of [another federal] felony"), cert. denied, 484 U.S. 867 (1987); U.S. Opening Br. 21-25 (tracing development of Section 924(c)(1)).

As Judge Alito observed in dissent below, respondent's characterization of Section 924(c)(1) is difficult to square with the fact that eight of the nine courts of appeals that have considered the issue have held that "only one § 924(c)(1) violation can be appended to any single predicate crime." Pet. App. 50a (collecting cases). If a discrete *use* of the firearm were the entire essence of the offense, those courts logically should have held that every single use of a gun in the context of a crime of violence would be a separate offense. But the courts that have rejected that argument have concluded instead that "the draftsmen were not employing the word 'uses' to imply that each discrete

act that might be called a 'use' constitutes a separate crime." *Anderson*, 59 F.3d at 1326-1327. Rather, the drafters meant that "if during the course of a crime a defendant uses [or carries] a firearm at any time, he commits a separate crime." *Ibid.* (emphasis omitted) And because the crime of violence here (the kidnapping) is clearly a continuing offense, the Section 924(c)(1) offense committed by respondent—namely, committing the kidnapping *and* using a gun during that kidnapping—is a continuing offense as well.

3. *The Court of Appeals' Verb Test*

As we explained in our opening brief (at 24-27), the court of appeals' rigid "verb test," under which venue is entirely dependent on the verb used by Congress in defining a statutory offense (see Pet. App. 14a-15a), should be rejected because, in some circumstances, it can make venue dependent on immaterial portions and aspects of the statutory language rather than on the true nature of the offense defined by the statute. Respondent does little to rebut that showing. In particular, he fails to address our point (U.S. Opening Br. 26) that Congress could have redrafted Section 924(c)(1) to convert other parts of speech into verbs even while retaining the identical meaning of the statute—which under the verb test would lead to a different venue result for a substantively identical statute. The Constitution's venue provisions should not turn on such irrelevant distinctions.

Respondent points out (MS Br. 19-21) that several courts and commentators have endorsed the verb test as, at least, a starting point for identifying the proper venue for an offense (unlike the court of appeals, which treated the verb test as the sole inquiry, see Pet. App. 14a). But our argument is not that the verb in a statute

is irrelevant to venue; rather, it is that other aspects of a statute, including other parts of speech and the nature of the offense defined by the act, are relevant as well. Thus, this Court has *not* held that venue depends solely on the verb in the statute defining an offense; rather, it has held that venue depends on "the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 118 S. Ct. at 1776.[6] Indeed, one of the sources on which respondent relies (see MS Br. 19) does not endorse a strict reliance on the verb in a statute, but rather describes venue as dependent on "the verbs, key terms, and policies underlying the statute defining the crime." 25 *Moore's Federal Practice* § 618.05[3][a] (Daniel R. Coquillette et al., eds., 3d ed. 1998). That is a more realistic approach consistent with our position in this case.

While the verb in a sentence may in some cases be sufficient to describe the nature of the crime for venue purposes, in others it may not.[7] In this case, the nature

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[6] Respondent himself provides an example. He argues that in *Travis* v. *United States*, 364 U.S. 631 (1961), the Court relied on the statutory phrase "on file with the Board" in concluding that the statute penalized the act of having a false statement at a particular place (with the National Labor Relations Board in Washington, D.C.). See MS Br. 17 n.12. "[O]n file with the Board," however, is a prepositional phrase, not a verb; even under respondent's reading of the case, therefore, *Travis* undermines his argument, because it shows that this Court has looked to parts of speech other than verbs to determine the *actus reus* of an offense.

[7] See, *e.g.*, *United States* v. *Billups*, 692 F.2d 320, 332 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983). In that case, the court of appeals rejected the verb test to determine venue for a prosecution under 29 U.S.C. 186(b)(1), which makes it unlawful for any union official to "request, demand, receive, or accept, or agree to receive or accept" a payment from an employer. The court found venue to be proper in Virginia (where the employer and union

of the crime includes both the element of using of the firearm (which is expressed by a verb) and the element of the commission of a crime of violence, during and in relation to which the firearm is used (which is expressed by a prepositional phrase). The true nature of the offense is not expressed by the verb alone.

4. *Venue Policies and Practical Considerations*

Respondent emphasizes (MS Br. 22-24) that the Constitution's venue provisions are intended for the benefit of the defendant, and in particular, are intended to prevent the government from prosecuting someone far from his home.[8] It is nonetheless true that venue does not turn on the residence of the accused; under the Constitution's venue provisions, a criminal defendant may always be prosecuted in the State where his offense was committed, whether or not that State is his place of residence. See *United States* v. *Anderson*, 328 U.S. 699, 705 ("[T]he geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides."). As we have explained (p. 4, *supra*), the Framers found no unfairness in bringing someone to justice in a place where he has chosen to commit a crime, and they did not require the authorities located in a particular jurisdiction where a crime is committed

were located) and rejected the defendant's argument that, under the verb test, venue was proper only in New York, where the payment had been accepted. "[T]here are crimes where the situs is not so simple of definition. So it is here—we cannot so easily garner and apply to the statute involved all of the rationale of Article III, the sixth amendment and Rule 18 from one single verb." 692 F.2d at 332.

[8] That argument does respondent little good in any event, for he spent barely a day in Maryland, which he contends is the only proper venue for this prosecution.

to go far afield to prosecute those who are responsible. Because respondent chose to commit some of the acts constituting the *actus reus* of Section 924(c)(1) in New Jersey and some in Maryland, he exposed himself to the risk of prosecution under that statute in both States, and he cannot claim unfairness in that he was brought to justice in one State rather than another.

Respondent argues that the government would suffer no appreciable burden if venue on the Section 924(c)(1) offense were held to be proper only in Maryland. He maintains that the government could prosecute him in two separate trials—one in New Jersey on the charge of kidnapping Mr. Avendano and one in Maryland on the Section 924(c)(1) charge—or that it could prosecute both charges in Maryland. MS. Br. 25-26. As we have pointed out, however (U.S. Opening Br. 30-31), both courses impose serious costs on the government and the judicial system. Two trials would require the government to marshal the same evidence twice, because even if the government secured a conviction against respondent in New Jersey on the kidnapping, it would have to prove the kidnapping again in the Maryland trial to show that respondent had committed the "crime of violence" element of Section 924(c)(1).[9] On the other hand, moving both prosecutions to Maryland would entail similar costs, for that course would require the government either to bring a separate prosecution against respondent and his co-defendants

[9] Moreover, as the court of appeals pointed out (Pet. App. 27a), the botched drug transaction provided the motive for the kidnapping. Thus, if the government had to prove the kidnapping against respondent a second time it would have to prove the drug activities as well. Much or all of this multi-week trial would have to be repeated.

for the kidnapping of Mrs. Avendano (since that offense was committed in New Jersey, not in Maryland), or to drop that charge altogether.

Respondent also argues (MS Br. 26-28) that dropping the Section 924(c)(1) charge entirely would cause the government little prejudice because, under the Sentencing Guidelines, his use of the firearm could be taken into consideration in establishing his sentence. The Sentencing Guidelines do permit an upward adjustment of the defendant's offense level to reflect the use of a firearm during an offense. See Guidelines § 2A4.1(b)(3) (1997); U.S. Opening Br. 32. That adjustment, however, is not a substitute for the mandatory five-year consecutive sentence that Congress required under Section 924(c)(1).[10] Indeed, Congress considered the mandatory prison term under Section 924(c)(1) to be so important that it made that statute applicable even when the defendant was also charged with another federal offense containing its own sentence-enhancement provision for use of a firearm. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983) (explaining that amendment would overturn the effect of this Court's decisions in *Simpson* v. *United States*, 435 U.S. 6 (1978) and *Busic* v. *United States*, 446 U.S. 398 (1980)); U.S. Opening Br. 23. Abandoning Section 924(c)(1) charges in cases like this would run directly counter to the congressional policy behind Section 924(c)(1).

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[10] Respondent's offense level under the Sentencing Guidelines, without any adjustment for use of a firearm, was 27, which translates to a sentencing range of 87 to 108 months' imprisonment. See Sentencing Tr. 67. With a two-point upward adjustment to 29 for use of a firearm, his sentencing range would be 108 to 135 months' imprisonment. See Guidelines Ch. 5, Pt. A (sentencing table)

* * * * *

For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals, reversing respondent's conviction under 18 U.S.C. 924(c)(1), should be reversed.

Respectfully submitted.

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Solicitor General

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No. 97-1139

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

JACINTO RODRIGUEZ-MORENO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) is proper in any district in which the defendant committed the underlying crime of violence, even if the defendant did not use or carry the firearm in that district.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice.

NACDL files this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of respondent. Both petitioner and respondent have granted NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

The primary interest of *amicus* in this case, as it was in *Cabrales*,[2] is the potential impact of this case on the future interpretation of the Venue Clause in other criminal prosecutions. The Government's claim to lay venue in new Jersey in this case represents an unprecedented and unwarranted expansion of its power to choose the place of trial.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

[2] *United States v. Cabrales*, 118 S.Ct. 1772 (1998).

A decision in favor of the Government has the potential to seriously impair the ability of defendants to get a fair trial as guaranteed by the Venue Clause. Trials could be wrenched from the communities in which the 924(c)(1) gun crime was allegedly committed to distant venues based on acts allegedly committed by others in connection with the predicate to the 924(c)(1) offense. By extension, any crime involving multiple elements would permit the Government to roam in any state or judicial district where "any part" of a crime or predicate offense to a crime was committed. Being forced to stand trial while separated from family and friends, removed from work or place of business, and often deprived of representation by defendant's known and trusted counsel is potentially devastating to an effective defense.

The brief of *amicus* does not address every point argued by the parties. The relevant case and statutory law has for the most part been addressed, and duplication of these arguments would not benefit the Court's decisional process. *Amicus* therefore concentrates on two points which may assist the Court in deciding this case -- the historical context for the constitutional venue privilege and the misplaced reliance of both the court of appeals and the United States on the "active verbs" test instead of the actus reus of a 924(c)(1) offense.

SUMMARY OF ARGUMENT

Article III, sec. 2, cl. 3 of the Constitution requires that criminal trials "shall be held in the State where the said Crimes shall have been committed." This provision of the Constitution was adopted even before the Bill of Rights as a protection against governmental oppression. The Framers responded to the fierce opposition of the Colonists to Acts of Parliament that allowed the Crown to force a defendant to trial in alien territory or another colony.

Outrage at the English colonial practice was a reaction to the practical hardships imposed when a defendant was dragged away from family, friends, employment, and sometimes his counsel to stand trial in a distant locale. In short, the Venue Clause protects a defendant from being tried at a far remove from the place of his allegedly criminal conduct.

Petitioner now asks this Court for an unprecedented and unwarranted expansion in its power to choose the venue for a criminal trial in a place because *a predicate offense* of that crime was committed there. The core of the Government's argument is its quotation of the *Lombardo* Court's dictum, out of context, that venue is proper where "any part" of the crime is committed. *United States v. Lombardo*, 241 U.S. 73, 77 (1916).

But, unlike a continuing offense, a 924(c)(1) offense is a point-in-time offense. A 924(c)(1) offense is committed when and where a firearm is used "during and in relation to" a crime of violence or drug offense. It cannot by any plausible interpretation of the statute, consistent with the Venue Clause, be deemed committed before the gun is used or carried. Venue does not "relate back" to the anterior or predicate offense.

Thus, although respondent committed a crime in New Jersey (kidnap), New Jersey was not the site of the 924(c)(1) crime alleged in the indictment. That offense was committed in Maryland, if at all. The Government's attempt to lay venue in New Jersey is unfaithful to the constitutional command that trial be had where the crime was "committed" and more in keeping with the spirit of the English colonial laws, which allowed the Crown to set venue in places chosen for its own convenience and/or for its prejudicial effect on the defendant.

The Third Circuit Court of Appeals reached the correct result despite its unnecessary reliance upon the "active verbs" test.

ARGUMENT

I. THE HISTORY OF THE VENUE CLAUSE COUNSELS AGAINST AN EXPANSIVE INTERPRETATION OF THE PLACE WHERE AN ALLEGED CRIME IS COMMITTED.

The Constitution requires that venue lie at the place where the crime is alleged to have been committed:

> The trial of all Crimes, except in cases of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such a Place or Places as Congress may by Law have directed.

U.S. Const. Art. III, sec. 2, cl. 3. This Court has ruled that venue concerns in criminal trials

> are matters that touch closely the fair administration of criminal justice and public confidence in it. . . . Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy. . . .

United States v. Johnson, 323 U.S. 273, 276 (1944).

The deep issues of public policy arise because the venue privilege is a protection against the arbitrary use of governmental power arising from English laws that allowed the removal of criminal trials to vice-admiralty courts. The Stamp Acts and the Townshend Acts of the 1760's, for example, empowered the vice-admiralty courts to try such cases. Defendants in vice-admiralty courts did not enjoy the right to a jury trial. Criminal charges that would be tried by jury in a colony's courts were heard by a sole judge sitting at the pleasure of the British Crown.[3] Adding insult to injury, venue in many of these cases was set in Halifax, Nova Scotia, where colonial defendants faced several evils: defending themselves in a land foreign to them and without their own counsel, losing their land by the required absence, and an almost certain conviction at the hands of a legal system tilted against them. *Id.* Additionally, the Administration of Justice Act of 1774, another of the "Intolerable Acts," included a provision that allowed venue in other colonies or England for prosecutions of felonies committed by officials.[4]

In reaction to the Intolerable Acts, Edmund Burke noted that English venue would present particular hardship to colonial defendants: "brought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence." Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994) [quoting EDMUND BURKE, LETTER TO

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[3] Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 108-109 (Harvard University Press 1992) (1967).

[4] Alfred H. Kelly and Winfred A. Harbison, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 76 (NORTON 1976) (1948).

THE SHERIFFS OF BRISTOL, THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 189, 192 (Little Brown, 9th ed. 1889)].

The Declaration of Independence also denounces these abuses: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation. . . . For transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence, para. 16 (1776).

A leading treatise on criminal procedure summarizes the historical rationale for venue where the crime was committed:

> The crime-committed formula offered several elements of convenience for the defense. Relevant evidence would most readily be accessible at the place where the incident constituting the alleged offense had occurred. Any witnesses to the incident were most likely to live in the vicinity and any relevant tangible evidence was most likely to be found there. Trial in a distant place would impose upon the defendant the often serious hardship of arranging for the transportation of such witnesses and tangible evidence.

La Fave and Israel, CRIMINAL PROCEDURE 741 (West 2d ed. 1992). Further, note the authors, "the crime-committed formula often facilitated use of jury of the vicinage. . . ." *Id.*

Now, it is true that the historical reason for safeguarding a defendant's venue privilege is not quite as

compelling in the context of a modern mobile society. One critic has observed that the crime-committed test bears "no necessary connection to the location of the victim, witnesses, documents or other similar factors. It does not take account of the residence of the accused. . . ." Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. Rev. 751 (1962). In other words, the goal of protecting a defendant's right to be tried close to home is not necessarily furthered by venue at the situs of the alleged crime if it was committed away from home.

The proper response to this point is two-fold. First, while there is no necessary connection, it is certain that many crimes are in fact committed in a defendant's "backyard" so to speak; as to those, the historical reason for the venue privilege remains intact. The privilege should not be discarded or diminished by a tortured interpretation of the place that the crime is committed because in some cases it does not protect against a distant trial.[5] The constitutional command remains intact. The harm to a defendant who is dragged off to stand trial in an alien venue can hardly be overstated. He will generally be removed from the support of his family and friends, cut off from employment, have less chance of being admitted to bail, and deprived of the assistance of his customary counsel. Even if his regular counsel is free to leave his practice behind and travel to another district, the costs are obviously greater and local rules may require retaining local counsel, thus increasing the costs even more. Even if this is not always true, it is true often enough to counsel against

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[5] The government has presented no empirical evidence to suggest that most federal crimes are committed at a location that inconveniences a defendant or impairs his defense. At the very least, the burden of proof on such an important – and dubious – proposition should rest with the government.

reading the historic protection for the defendant in the manner most favorable to the very government sought to be restrained by the Venue Clause. After all, the Government resides and has counsel in every venue. The defendant does not.

Second, if a crime is alleged to have been committed *by him* at a distant locale, trial there is authorized by the Venue Clause and is fair on a fireside equity basis because the defendant bears responsibility for his distant actions (or those alleged to have been committed by him or by others acting on his behalf). Distant venue based on complicity or conspiracy derives from well-established principles of vicarious responsibility. Distant venue based on a predicate of the offense does not and should not be extended.

II. A 924(c)(1) OFFENSE IS A SEPARATE AND DISTINCT OFFENSE WHICH OCCURS AT THE TIME AND PLACE WHEN AND WHERE THE WEAPON IS USED OR CARRIED.

The rule that venue may be placed in a district where any conspirator acts in furtherance of the conspiracy is settled law. *Hyde v. United States*, 225 U.S.. 347, 357 (1912). Nonetheless, peripatetic venue in a conspiracy case may push the Venue Clause to its outer limits. In *Krulewitch v. United States*, 336 U.S. 440 (1949), Justice Jackson voiced his displeasure with the rule:

> An accused, under the Sixth Amendment, has the right to trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district. Circumstances may even enable the prosecution to fix the place of trial in Washington, D.C. where a defendant may lawfully be put to trial before a jury partly or wholly made up of the Government that accuses him.

Krulewitch at 452-453 (Jackson, J. concurring).

Arguably, placing venue in conspiracy prosecutions anywhere a conspirator agrees or acts is a reasonable response to group criminality; after all, the trial must be held somewhere and, as long as there is to be a joint trial, there is no basis for favoring one codefendant over another. Still, Petitioner offers no compelling reason to extend these harsh results to 924(c)(1) prosecutions. Certainly, a 924(c)(1) offense is not inherently a conspiracy-like crime.

Petitioner also relies on *United States v. Johnson*, 323 U.S. 273 (1944), as supporting its position that a defendant may be tried in any district where there is a use of the mails or instrumentality of commerce. Brief for Petitioner at 17. But we have no such use in 924(c)(1) cases, and the Court in *Johnson* was

> aware of the unfairness and hardship to which trial in an environment alien to the accused

> exposes him. . . . By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. . . . Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution. *Johnson* at 275.

Johnson offers at least two lessons. First, the "force propelled" by respondent with respect to the use of his gun occurred only in Maryland. Second, where "an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id.* Plainly, the Johnson Court recognized the hardship engendered by prosecutions in districts where the defendant did not commit the crime charged either through his own actions or those of another.

Petitioner also argues that the continuing offense rule of 18 U.S.C. 3237[6] should apply. Brief for petitioner at 16. But, the 924(c)(1) violation did not "begin" in New Jersey and

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[6] 18 U.S.C. 3237(a) states:
"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

end in Maryland. Although the underlying kidnap may be a continuing offense, the use of the firearm under 924(c)(1) is not. 924(c)(1) prohibits using or carrying a firearm "during and in relation to" another crime. But the 924(c)(1) offense is itself a point-in-time offense: it cannot occur, as a matter of law, until the weapon is used or carried.

The government's other arguments based on practicalities and convenience are completely misplaced. This is not an issue of *forum non conveniens*. It is an accused's absolute right to insist on separate trials in New Jersey and Maryland for, respectively, the kidnap and the gun charge. It is the accused's exclusive privilege to decide what is in his legal best interest, just as this Court decided in *Faretta v. California*, 422 U.S. 806 (1975), that a defendant has a Sixth Amendment right to choose to represent himself. Petitioner wishes this Court to accept new and unwarranted changes to the constitutional venue protection to make venue plastic and convenient to the government. That is not the law, and appeals to congressional intent underlying 924(c)(1) can be of no avail, since a statute can never trump an explicit constitutional guarantee.

Amicus can see no escape from the logic that a 924(c)(1) offense is not committed unless and until a firearm is used or carried, no matter where the predicate crime to which the firearm is used "during or in relation to" may have begun. In this respect, the active verbs test used by the court below, and cleverly deconstructed by the Government, is unnecessary to a proper analysis of the issue presented: the 924(c)(1) crime is committed where and when the firearm is used or carried regardless of active or passive voices simply because that is the actus reus of the offense.

"[T]he locus delicti must be determined from the nature

of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). Congress' purpose in enacting 924(c)(1) was "to persuade the criminal to leave his gun at home." The *Bailey* Court in construing the term "use" to mean "active employment" illustrated the term's meaning in the following passage:

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. We note that this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."

Bailey v. United States, 516 U.S. 137, 148 (1995) (emphasis added). The underlined phrase highlights the very essence of the offense proscribed in 924(c)(1). In prohibiting the use of a firearm in conjunction with a crime of violence, the section seeks to inhibit the transformation of a given criminal act into one which is torqued with the potential for more violence. *See, e.g., Smith v. United States*, 508 U.S. 223, 240 (1993) (Court stating that "a gun's role in a drug offense as a weapon and its role as an item of barter. . . creates a grave possibility of violence and death in either capacity").

If the section was enacted to inhibit the use of a firearm ***during*** and in relation to a crime of violence, then its commission occurs either contemporaneously with the

predicate offense or at some later time. In other words, a violation of section 924(c)(1) can only be committed where the defendant loses his inhibition and uses or carries a firearm to bring about a change in the circumstances surrounding the predicate offense.

From this it can be seen that the Government's reliance on the "any part" dictum of *Lombardo* is misplaced. The full quotation reads as follows:

> Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy. *Lombardo*, 241 U.S. at 77.

There is no part of the section 924(c)(1) offense occurring before the use or carrying of the firearm in Maryland.[7]

As in *Cabrales*, *supra*, the active-employment of a gun

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[7] It is also apparent from the facts of *Lombardo* that the "any part" language is dictum. In that case alien prostitutes were housed or kept in Washington state, and venue was laid in Washington state. The Supreme Court affirmed dismissal of the indictment, holding that the offense of failure to file a required statement with the Commissioner General of Immigration occurred, for venue purposes, in Washington, D.C., the place where the statement was to be filed. In so holding, the Court rejected the Government's argument that "the offense was a continuing one" since the accused could have "filed" the statement by posting and dropping in any U.S post office the statement addressed to the Commissioner. 241 U.S. at 76.

to facilitate a kidnaping might rank as a "continuing offense," triable in more than one place, if the kidnapper used the firearm in one district and used it again in another or used the firearm continuously in transporting the victim from one state into another state. But, in this case, the firearm was displayed and pointed for the first and only time at the victim in Maryland. It was solely in Maryland where the defendant lost his inhibitions to use a firearm and created "a grave possibility of violence and death." Accordingly, the appropriate place to have tried Respondent was in Maryland and not in New Jersey.

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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